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UNITED STATES DEPARTMENT OF JUSTICE

THURSDAY, JUNE 5, 2003

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 9:15 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order.

The Department of Justice is one of the world's most important agencies and the world's premiere law enforcement organization. With an annual budget exceeding 20 billion and a workforce of over 100,000 employees, the Department is an institution whose mission and values reflect the American people's commitment to fairness and justice.

The importance of the Department has only increased since the tragic events of September 11. On that day, America was struck by an adversary united only by its hatred of the values America represents. In the wake of these attacks the Judiciary Committee has acted with bipartisan dispatch to provide the Department with the resources to effectively assess, detect, prevent and punish those who threaten our security.

When you last testified before the Committee, Mr. Attorney General, I expressed strong support for equipping law enforcement to meet emerging threats, while reiterating my commitment to preserving the civil rights and liberties that distinguish us as Americans.

I was pleased to introduce and lead Congressional passage of the PATRIOT Act, which has strengthened America's security by providing law enforcement with a range of tools to fight and win the war against terrorism. Since passage of this legislation, America has made impressive gains against terror. U.S. Law enforcement authorities have utilized expanded information-sharing provisions contained in the PATRIOT Act to gain critical knowledge of the intentions of foreign-based terrorists while preempting, gathering terrorist threats at home. Earlier this week, a jury convicted two members of a terrorist sleeper cell for conspiracy to commit terrorist attacks against a range of targets on American soil.

In a relatively short period the Justice Department and FBI have made impressive gains toward assessing and preventing terrorist attacks before they occur. This fundamental shift in focus is only beginning to pay long-term dividends for the security of all Americans. However, as I stressed during legislative consideration of the PATRIOT Act, my support for this legislation is neither perpetual

nor unconditional. I believe the Department and Congress must be vigilant toward short-term gains which ultimately may cause long-term harm to the spirit of liberty and equality which animate the American character. We must maintain the fundamental commitment to ensure the protection of Americans while defending the beliefs that make us Americans.

To my mind, the purpose of the PATRIOT Act is to secure our liberties, not to undermine them. In order to ensure the proper application of the PATRIOT Act, the Committee has closely overseen its implementation.

On May 13 of this year, I was pleased to receive extensive responses to comprehensive questions which I jointly submitted to the Department with Ranking Member Conyers. These responses and testimony received at today's hearing will better enable Congress to continue to provide support and guidance that strengthens our collective ability to meet and defeat emerging threats.

To further advance these goals, several Subcommittees of this Committee have conducted oversight hearings which have examined the operation and priorities of the Department. As Chairman of the Committee, I have continued to help provide the Department with the legislative resources to carry out its crucial mandates. At the same time, this Committee has worked to ensure that the Department's structure, management and the priorities are tailored to best promote the purposes for which it was established.

Last year, Congress authorized the Department of Justice for the first time in over 20 years, a legislative accomplishment which reaffirmed our constitutional obligation to maintain an active and continuing role in organizing the priorities and overseeing the operations of the executive branch. By working in concert to identify solutions to the growing challenges faced by Federal law enforcement, Congress and the Administration are better able to provide for the safety and security of all Americans.

Mr. Attorney General, I look forward to your testimony and recognize Ranking Member Conyers for his opening remarks.

Chairman SENSENBRENNER. The gentleman from Michigan.

Mr. CONYERS. Thank you.

Chairman Sensenbrenner and I want to welcome, as we all do, the Attorney General of the United States, a person very familiar with the legislative process, and we gather here today after missing your presence for a while to do two things that is a curious function of the Committee on the Judiciary. The first, of course, is to support the Department of Justice and the several agencies that work underneath it. The second is to oversight the Department of Justice.

And I am very pleased to suggest that with Chairman Sensenbrenner and yourself, we are looking at a longer-range way to examine all these functions that are under your Department's jurisdiction. In other words, it has been my view and the Chairman's that we could have a great little blast here today, but that it would be far more purposeful if we were to have several meetings in which we break down the subject matter, because every Member here is doing what they feel is important, with these kind of time constraints, even though you have given generously of yourself today, frequently don't serve as useful a purpose. And I am happy

that your initial reaction to this proposal has been favorable. I hope that it can happen.

Now, the events of 9/11 have required us not only to look at who the adversaries of America are, but how we go about dealing with the adversaries of America, particularly internally. We have got the Constitution and the rights that are guaranteed to everyone on these shores. We have got due process. We have the great traditions that have accompanied us, and, really, that separate this country from our adversaries.

And when you are engaged in war, there is always the national inclination to let's go get them any way we can, no holds barred. Well, we are a Nation of laws and not men. And it is in that arena that this Committee, of all the Committees in the Congress, has the jurisdiction over constitutional questions, the Department of Justice itself, the FBI, immigration, the laws that control the entire Nation.

All of these things are up for reexamination, and it is no secret that there has been a lot of questions and controversy about the way some of the things have been done in the Department. And so you have given me a very encouraging signal that we can go about this from your point of view and ours to responsibly categorize all of these different subject matters. I mean, to have one person come here and talk about A to Z and anything in between is a bit of a task for anyone.

It is in that spirit that we come together, Attorney General Ashcroft, hoping that we can do our job. We are marching into history. This is not only being examined in great detail right now, but it is going to be examined, as we all know, in far more detail after it is over. And we want to acquit ourselves as honorably as we can under these circumstances. And so I am very happy to welcome you here this morning.

Chairman SENSENBRENNER. The gentleman's time has expired.

Without objection, all Members may include opening statements in the record at this point.

Chairman SENSENBRENNER. And before I introduce the Attorney General, let me follow up on what Mr. Conyers said, talking about the process today and in the future. There will be one round of questions today, and the Chair will strictly enforce the 5-minute rule on all Members of the Committee, including the Chairman. And the Attorney General is with us until 2 p.m., so the adjournment time of the Committee will either be at 2 p.m. or whenever the first round of questions is over with, whichever comes earlier.

In the next week or so, the Department of Justice and the majority and minority sides will put together a road map in terms of how we deal with the issues on a functional and topical basis, and it is during that period of time that I hope that we will be able to get agreement on how to deal with these important issues.

And, you know, let me say that I think it is to the benefit of everybody to deal with these issues publicly rather than through dueling press releases, sound bites and the like, because we are dealing with very sensitive issues that involve complex issues of law and ultimately the security of the American people. And I think we all want to deal with this issue, these issues, in a bipartisan way. And I can tell you, Mr. Attorney General, that this will

give the Justice Department perhaps a better opportunity to present its side of the argument than what might have been going on in the past.

So with that road map—and everybody is now talking about road maps about all kinds of issues—it is my honor and privilege today to introduce Attorney General John Ashcroft. General Ashcroft was sworn in as the Nation's 79th Attorney General on February 1, 2001. His tenure has been marked by national circumstances faced by few, if any, of his predecessors. He is regarded by both supporters and detractors as a strong advocate for law enforcement and has taken steps to focus the Department's investigative and enforcement priorities since the attacks on September 11.

Mr. Attorney General, would you please stand, raise your right hand and take the oath.

[Witness sworn.]

Chairman SENSENBRENNER. Thank you, Mr. Attorney General. You may proceed as you wish.

STATEMENT OF JOHN ASHCROFT, UNITED STATES ATTORNEY GENERAL

Attorney General ASHCROFT. Chairman Sensenbrenner, thank you very much. And Ranking Member Congressman Conyers, thank you very much. I am grateful for the opportunity not only to appear before you today, but for the time we spent together a few minutes prior to this hearing talking about the capacity and the opportunity of the Justice Department to clearly explain the way in which we seek to secure the rights and liberties of the people of the United States of America.

During Operation Enduring Freedom, on the windswept plateaus of Afghanistan, some American military commanders read a list every morning to their troops, names of the men and women who died on September 11. It was a stark reminder of why they were there. Joseph Maffeo, Diane Hale—McKinzy, Susan Ann Ruggiero, Manny Del Valle, Wanda Prince, Charles E. Sabin. To read every name of every victim who died at the hands of terrorists on September 11 would take 3 hours. To read all the names of the sons, the daughters, the husbands, wives, friends and families affected by the loss of loved ones on that tragic day would take an eternity.

I come before this Committee having not forgotten the promise made to those stolen from us by terrorism's ideology of hate. The roots of this murderous ideology can be found in the 1998 fatwah issued by al Qaeda's founders, Osama bin Laden and Ayman al-Zawahiri, declaring war on American civilians, the international Islamic front for jihad. In it they wrote, "The judgment to kill Americans and their allies, both civilian and military, is the individual duty of every Muslim able to do so and in any country where it is possible."

I continue to quote: "We in the name of God call on every Muslim who believes in God and desires to be rewarded to follow God's order to kill Americans and to plunder their wealth wherever and whenever they find it."

On September 11, bloodthirsty terrorists answered bin Laden's call for killing. Twenty months ago President Bush pledged that al Qaeda and the terrorist network would not escape the patient jus-

tice of the United States, for we would remember the victims of terrorism. Today brave men and women in uniform abroad and at home answer our President's call for justice. Sworn to defend the Constitution and our liberties, and motivated by the memories of September 11, they live each day by a code of honor, of duty and of country, and they know that they must die preserving the promise—that they may die preserving the promise that terrorism will not reach this land of liberty again, for we are a Nation locked in a deadly war with the evil of terrorism.

We will not forget that in Afghanistan on the dusty road to Kandahar, Army Sergeant Orlando Morales was killed on reconnaissance patrol 70 in a town called Geresk. He leaves behind a wife and a 17-month-old daughter. Sergeant Morales was in Afghanistan fighting to destroy the Taliban regime, terrorist operatives and their training camps. His sacrifice was not in vain.

In this war, over half of al Qaeda's senior operatives have been captured or killed. Some of those captured with operatives like Khalid Shaik Mohammed, others like military commander Mohammed Atef are silenced forever. Overall, more than 3,000 foot soldiers of terror have been incapacitated.

We will not forget that in the battles in Iraq, Marine Lance Corporal David Fribley of Warsaw, Indiana, was killed near Nasiriyah by Iraqi soldiers who pretended to surrender, but then opened fire. Lance Corporal Fibley made the ultimate sacrifice to free the Iraqi people and to eliminate a key sponsor of terror.

We must not forget that this great fight for freedom did not end in Kabul. It will not end along the banks of the Tigris and Euphrates. The fight continues here on America's streets, off our shores and in the skies above. Americans do not shy away from danger or turn away from threats to liberty. On September 11 we saw our Nation's finest ideals in action: Firefighters and police officers who rushed to, not from, the World Trade Center. We saw Americans embrace duty, face danger, and sacrifice their lives for their fellow citizens and for freedom. On that tragic day, 343 firefighters and 71 police officers died in the line of duty.

Today the Justice Department, agents of the Federal Bureau of Investigation, as well as our State and local law enforcement counterparts uphold the legacy of the fallen heroes. From State troopers on the roads to cops on the beat, from intelligence analysts to FBI field agents, these are the sentinels serving with silent determination, the objective of protecting America's citizens.

They wage this defense with the tools that you help provide them. Twenty months ago you understood what was needed to preserve freedom. You understood that our Nation's success in this long war on terrorism demanded that the Justice Department continuously adapt and improve its capabilities to protect Americans from a fanatical, ruthless enemy. That's why you worked so hard together with us to shape an anti-terrorism law housed in the framework of American freedom, guided by the Constitution of the United States. Congress overwhelmingly approved the USA PATRIOT Act, and I am grateful to you and the other Members of the Congress for so doing. In the House, Representatives voted 357 to 66 for the measure, while the Senate supported the legislation by a near unanimous vote of 98 to 1.

The PATRIOT Act gave us the tools we needed to integrate our law enforcement and intelligence capabilities to win the war on terror. It allowed the Department of Justice to use the same tools from the criminal process, the same tools on terrorists that we use to combat mobsters or drug dealers. We use these tools to gather intelligence and to prevent terrorists from unleashing more death and destruction within our country. We use these tools to connect the dots. We use these tools to save innocent lives.

The Buffalo cell case shows how the PATRIOT Act and the criminal process can drive intelligence-gathering. There we learned of information about individuals who allegedly trained in an al Qaeda camp in Afghanistan and lived in the United States. The Department used confidential informants to gather facts. We used subpoenas to collect travel information to track their movements. We deployed surveillance to record conversations. We used search warrants to locate weapons and jihad materials. And we used some of the best interrogators from the FBI to obtain critical admissions from some of the defendants.

The Department also used one of the most effective tools at the Government's disposal: The leverage of criminal charges and long prison sentences. As is often the case with criminal defendants, when individuals realize that they face a long prison term, like those under the PATRIOT Act, they will try to cut their prison time by pleading guilty and cooperating with the Government. In fact, since September 11, we have obtained criminal plea agreements, many under seal, from more than 15 individuals who, according to the agreements, and in order to have the agreement carried out, will continue and must continue to cooperate with the Government in investigation of terrorists. These individuals have provided critical intelligence about al Qaeda and other terrorist groups, about their safe houses, their training camps, their recruitment, their tactics in the United States, and their operations of terrorists who mean to do American citizens harm both here and abroad. One individual has given us intelligence on weapons stored here in the United States. Another cooperator has identified locations in the United States being scouted or cased for potential attacks by al Qaeda.

With the PATRIOT Act and our prevention strategy, we can point to steady progress in America's war on terrorism. We are targeting terrorists here at home while developing detailed intelligence on terrorist threats. Hundreds of suspected terrorists have been identified and tracked throughout the United States, with more than 18,000 subpoenas and search warrants issued.

Our human sources of intelligence have doubled as has the number of anti-terrorism investigations. In 2002, using the Foreign Intelligence Surveillance Act, which we refer to in the shorthand as FISA, we targeted more than 1,000 international terrorists, spies and foreign powers who threaten our country's security. We requested 170 emergency FISAs. This is more than three times the total number of emergency FISAs obtained in the prior 23-year history of the FISA law.

We are arresting and detaining potential terrorist threats, more than a dozen members. Alleged terrorist cells in Buffalo, Seattle, Portland, Detroit were arrested, along with more than 100 other in-

dividuals who were convicted or pled guilty to Federal crimes as a result of our post-September 11 terrorism investigations. Just last Tuesday we gained three convictions in the Detroit cell case, two on terrorist conspiracy charges and the third on visa and document fraud charges.

And we are shutting down the terrorist financial infrastructure. As a result of 70 investigations into the terrorist money trail, more than $125 million in assets and over 600 accounts were frozen around the world.

We are building a long-term counterterrorism capacity with over 1,000 new and redirected FBI agents dedicated to counterterrorism and counterintelligence, 250 new assistant United States attorneys, 66 Joint Terrorism Task Forces, and a 337 percent increase in staffing for those task forces.

Most important, no major terror attack has occurred on American soil since September 11. Let me be clear. Al Qaeda is diminished, but not destroyed. Defeat after defeat has made the terrorists desperate to strike again. Bombings in Tel Aviv, Israel, Bali, Indonesia, Casablanca, Morocco, and Riyadh, Saudi Arabia are bitter reminders that the cold-blooded network of terror will continue to use the horror of their heinous acts to achieve their fanatical ends. Innocent American and Saudi citizens died in the Riyadh compounds last month at the hands of al Qaeda.

We will not forget American Obadiah Abdullah, who converted to Islam after retiring from an 11-year career in the U.S. Army, took a job that would allow him to make a pilgrimage to Mecca, a victim of terror.

Clifford Lawson retired as an Army staff sergeant in 1997. He had a talent for computers and electronics, and he loved his family. He was supposed to return home for his son's 13th birthday next month.

Todd Blair also served in the military. Just 2 weeks before he was murdered, he returned from a visit with his family. He was a man of faith who leaves behind a wife and two sons ages 11 and 8.

We must be vigilant. We must be unrelenting. We must not forget that al Qaeda's primary terrorist target is the United States of America. Even though recent attacks were overseas, the terror network is committed to killing innocent Americans, including women and children, by the thousands or even the millions if they can.

Nasser al-Fahd is a prominent extremist Saudi cleric known to have significant connections to al Qaeda operatives who seek his religious justification and his support for terrorist operations. Just last month he issued a new fatwah entitled "The Legal Status of Using Weapons of Mass Destruction Against Infidels." This fatwah lays out, last month, his religious arguments for the use of weapons of mass destruction against Americans, including women and children. Let me quote. He puts it this way, and I am quoting now, of course, translated: "Anyone who considers America's aggressions against Muslims and their lands during the past decades will conclude that striking her is permissible."

Al-Fahd asserts, and I am quoting again, "The weapons of mass destruction will kill any of the infidels on whom they fall regardless of whether they are fighters, women or children. They will de-

stroy and burn the land. The arguments for the permissibility are many."

I quote further: "If a bomb that killed 10 million of them and burned as much of their land as they have burned Muslims' land were dropped on them, it would be permissible."

Despite the terrorist threats to America, there are some, both in Congress and across the country, who suggest that we should not have a USA PATRIOT Act. Others who supported the act 20 months ago now express doubts about the necessity of some of the act's components. Let me state my view as clearly as possible. Our ability to prevent another catastrophic attack on American soil would be more difficult, if not impossible, without the PATRIOT Act. It has been the key weapon used across America in successful counterterrorist operations to protect innocent Americans from the deadly plans of terrorists.

Unfortunately, the law has several weaknesses which terrorists could exploit undermining our defenses. First, in pursuit of terrorist cells, current law makes it a crime to provide a terrorist organization with personnel or training. We must make it crystal clear that those who train for and fight with a designated terrorist organization can be charged under the material support statutes.

Second, existing law does not consistently encourage cooperation by providing adequate maximum penalties to punish acts of terrorism. Some terrorist acts resulting in the death of citizens do not provide for the death penalty or even life in prison.

Third, terrorist offenses are not expressly included in the list of crimes that allow for pretrial detention even though it could prevent an attack. I think pretrial detention should be something preferred for a lot of serious crimes, and it is. But it should be preferred for terrorism crimes as well. In criminal cases where public safety is of concern, such as drug dealing, organized crime, gun crimes, defendants in Federal cases are presumptively denied pretrial release. It seems as though the crime of terrorism should have the same presumption.

As we weigh the constitutional methods we will use to defend innocent Americans from terrorism, we must not forget the names that unite us in our cause: Cherone Gunn, Ronald Scott Owens, Ronhester Santiago, Timothy Saunders, Lakiba Nicole Palmer. These are some of the brave men and women of the USS Cole who were murdered by al Qaeda in 2000. A week ago when I met with the families of those who died on the Cole, they pleaded with me not to forget them or those who died. I am committed to those families and those patriots not being forgotten.

Cherone Gunn had been in the Navy less than a year and loved serving his country. He wanted to become a law enforcement officer. Ronhester Santiago planned to study electrical engineering at the University of Texas. Ronald Scott Owens left behind his wife Jamie and a little girl named Isabelle Marie. Lakiba Palmer died leaving an 18-month-old daughter who will never know her mother. The two daughters of Timothy Saunders were 10 and 7 when they lost their father.

The names that I have recalled today all bear silent, painful witness to the fact that the United States is a Nation at war. We must never forget that we are in a war to preserve life and liberty. We

must not forget that our enemies are ruthless fanatics and seek to murder innocent women and children, men, to achieve their twisted goals. We must not forget that in the struggle between the forces of freedom and the ideology of hate, our challenge in this war against terrorism is to adapt, to anticipate, to outthink, outmaneuver our enemies while honoring our Constitution.

The United States Department of Justice has been called to defend America. We accept that charge. We fight in the tradition of all great American struggles with resolve, with defiance and honor. We fight to secure victory over the evil in our midst. We fight to uphold the liberties and the ideals that define a free and brave people. Every day the Justice Department is working tirelessly, taking this war to the hideouts and havens of our enemies so that this never again touches the hearts and homes of America.

I thank you for this opportunity to testify today. I thank you for the constitutional weapons that you have provided that make the war against those who fight freedom a war whose conflict will be resolved in victory. And I thank the American people for their support and their faith in the justice of our cause. I would be happy to answer questions.

Chairman SENSENBRENNER. Thank you very much, Attorney General Ashcroft, for your very powerful testimony. And without objection, your written testimony will be placed into the record at this point.

[The prepared statement of Attorney General Ashcroft follows:]

PREPARED STATEMENT OF JOHN ASHCROFT

Twenty months ago President Bush pledged that the terrorists would not escape the patient justice of the United States. We launched a war against terrorism on two fronts.

Overseas, we are destroying terrorist bases and their infrastructure, while removing their sponsors and financiers. Here at home, the Justice Department is using every Constitutional means to identify, disrupt and dismantle terrorists, their supporters and financial networks, and to protect Americans from further acts of terrorism.

Just as the terrorists made their choices, so did we. We chose to defend freedom.

In Afghanistan, we destroyed the Taliban regime, terrorist operatives, and their training camps. Over half of al Qaeda's senior operatives have been captured or killed.

Some of those captured were operatives, such as operations planner, Khalid Shaik Mohammed. Others, like military commander Mohammed Atef, are silenced forever.

Overall, more than 3,000 foot soldiers of terror are locked up.

In the battle of Iraq, we eliminated a key sponsor of terror.

We are also targeting terrorists here at home, while developing detailed intelligence on terrorist threats:

- Hundreds of suspected terrorists have been identified and tracked throughout the U.S., with more than 18,000 subpoenas and search warrants issued;
- Our human sources of intelligence have doubled, as has the number of anti-terrorism investigations.
- In 2002, we targeted more than 1,000 terrorists, spies and foreign powers, who threaten our country's security. We requested 170 emergency FISAs. This is more than three-times the total number of emergency FISAs obtained in the 23 years prior to September 11th.

We are arresting and detaining potential terrorist threats:

- More than 20 members of alleged terrorist cells in Buffalo, Detroit, Seattle and Portland were arrested, along with more than 100 other individuals who were convicted or pled guilty to terrorist related crimes;
- The U.S. has deported 515 individuals linked to the September 11 investigation.

We are shutting down the terrorist financial infrastructure:

- As a result of 70 investigations into terror's money trail, more than $125 million in assets and over 600 accounts were frozen around the world.

We are protecting our borders:

- Hundreds of terrorists and criminals stopped through the National Entry-Exit Registration System (NSEERs) including 11 suspected terrorists, with at least one known member of al Qaeda;
- Since January 1st 2002, our integrated INS/FBI fingerprint checks at the border (IDENT/IAFIS), have led to the arrest of more than 5,000 fugitives, wanted for crimes committed in the United States.

We are building a long-term counter-terrorism capacity with:

- Over 1,000 new and redirected FBI agents dedicated to counter-terrorism and counter-intelligence;
- 250 new Assistant U.S. Attorneys; and
- 32 new Joint Terrorism Task Forces.

No major terror attack has occurred on American soil since September 11th.

Despite these impressive successes, however, we must remain vigilant. The capabilities of our terrorist foes are diminished, but not destroyed.

The bombings in Bali, in Morocco and in Saudi Arabia tell us the war is far from over. We must be mindful that another terror attack could happen here in the United States.

Our enemies have made their intentions clear. They will marshal every resource to make it happen.

As we consider the Constitutional methods we will use to fight the enemies of freedom, we must remember that terrorism threatens our future.

We must not forget that our enemies are ruthless fanatics, who seek to murder innocent men, women and children to achieve their twisted goals.

We must not forget that in the struggle between the forces of freedom and the ideology of hate, our challenge in this ongoing war against terrorism is to adapt, and anticipate, outthink and outmaneuver our adversaries.

The Justice Department has been called to defend America and its citizens from those who would do it harm. It is a responsibility we willingly accept. I thank you for the opportunity to testify today, and I look forward to continuing to work with you to meet this responsibility.

Thank you. I would now be happy to answer your questions.

Chairman SENSENBRENNER. Again, the Chair intends to strictly enforce the 5-minute rule and will be recognizing Members alternatively on each side of the aisle for 5 minutes in the order in which they appeared, beginning with the Chairman.

Mr. Attorney General, last May during the Memorial Day recess of Congress, you revised the Justice Department investigative guidelines that were first promulgated by Attorney General Levy during the Ford administration after extensive consultation with the Congress and updated by his successors. To what extent did the Department of Justice consult Congress before issuing the revised guidelines in August of last year? And what justified departing from the tradition of consulting Congress? Do you think further revisions are necessary, and if further revisions are planned, do you intend to return to the spirit of cooperation which typified the earlier revisions?

Attorney General ASHCROFT. Thank you, Mr. Chairman. The Levy guidelines were the product of extensive consultation that followed hearings relating to the conduct of the Bureau and abuses that had taken place, perceived and real abuses, and the hearings not only framed the change in the guidelines, but prompted a series of consultations, which are extensive. Since the Levy guidelines were published, there have been adjustments without those

kinds of consultations that were nearly as substantial adjustments in the '80's and by my predecessor Ms. Reno in the '90's.

Following September 11, the Department consulted very extensively with this Committee and Members of the Congress about the PATRIOT Act. I remember within days after September 11, I think by the next Sunday, we all met together, numbers of us, and we worked very closely on that.

In terms of the change in the guidelines which govern the internal operation of the Justice Department, the consultation was not substantial or significant. Perhaps I came to the conclusion that extending those guidelines in the same spirit as the PATRIOT Act had been extended was something that would be appropriate and would meet with the approval of the Congress. But I must say that we did not have extensive consultations about this exercise of executive responsibility to define the way in which the executive branch would conduct investigations.

I believe that there is value in consultation, and I would look forward to consulting with Members of this Committee about guideline adjustments in the future, because I think we can do a good job when we work together. And I—and any assumptions that I might have made that presumed that the kind of ideas of extending the guidelines to extend them in the same way that we had worked collaboratively to extend the law in the PATRIOT Act may have been one that presumed in a way that overestimated our previous consultation.

So I would say this: That the consultation was not substantial. I would look forward in further changes to guidelines regarding the conduct of the Department to improving those guidelines in the way that I could best do so, and I think including consultations would be helpful to an end product which was of value to the American people.

Chairman SENSENBRENNER. One major difference between the Levy guidelines and the revision of August 2002 is that it allowed FBI agents to attend public events such as political demonstrations, meetings and religious services, and to use data-mining services without any previous evidence that a crime was in the process of being committed or there was a conspiracy to commit a crime. So that predicate was removed as a result of the revisions that were announced last August.

On what basis will the determination be made that the purpose for attending the event or using the data-mining service is to prevent or detect terrorism, and who will make that decision?

Attorney General ASHCROFT. Well, first of all, let me just say that the entire effort of the Department of Justice has undergone a significant evolution from the idea that we somehow existed so that we could prosecute crimes that had been committed, and in that sense we waited 'til a crime was committed and then sought to prosecute, to find a way to prevent a crime from being committed. We came to the conclusion rather quickly at 9/11 that waiting for a crime to be committed and then prosecuting was an inadequate way to protect the American people when the perpetrators of the crime extinguish themselves purposely in the commission of the crime, and when they extinguish the lives of 3,000 people in the commission of the crime, the potential for prosecution is not a

very rewarding potential. So we had to make a shift in the way we thought about things. So being reactive, waiting for a crime to be committed, or waiting for there to be evidence of the commission of a crime didn't seem to us to be an appropriate way to protect the American people.

So then we had to develop guidelines that were well within the Constitution, clearly protecting the rights of people in the Constitution, we carefully did so, but we just said that FBI agents could go to any public place that any other citizen could go to on the same terms and conditions as the public if they were seeking to prevent terrorism. If they were gathering information, if they were in a—working to prevent terrorism, they could go to those kinds of places.

There are safeguards. No records are to be kept of what was said or done in those places unless there is evidence that a crime was being committed or developed. All FBI agents have to keep records of where they go and how they spend their time, so administrative records that they were there would be kept so that we could make sure that they as workers were doing the right things. But we are not in the business of keeping records on individuals, and it is specifically prohibited in the guidelines that records would be kept for people on the—for the exercise of their constitutional rights. And that's an explicit item, and, of course, those records can be audited in the process of the Department.

So those are the basic—that's the frame of reference. We have authorized people to do things that are not reactive after a crime has been committed, but are proactive to keep a crime from being committed. FBI agents are not authorized to go anyplace that a local policeman can't go, or the highway patrolman can't go, or the constable or sheriff or sheriff's deputy can't go, or any member of the public can't go. We've allowed FBI agents to go where the public can go on the same terms and conditions as the public when it comes to seeking to thwart terrorism, and we've asked that no records be kept regarding those visits unless they are records relating to the commission of a crime.

Now, it seems to me that's the right safeguard and balance necessitated by the fact that we must move from reaction and prosecution into a situation of anticipation and prevention when the lives of Americans are at stake in terrorism.

Chairman SENSENBRENNER. Thank you, Mr. Attorney General.

The gentlewoman from California, Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman.

Welcome, Attorney General Ashcroft. We are delighted that you are here to address some of the concerns that we identified in the questions that were sent to you by this Committee.

I first want to say that we all were shocked and still are outraged by what happened on 9/11. We, too, denounce terrorism in any form. When 9/11 took place, I was reminded of many of the stories I was told by my parents and grandparents about terrorism that had been experienced by African Americans in this country. I was—and I went back and I looked up everything that I could find about the 1921 Tulsa riots that took place in a little area called Greenwood right at Tulsa, where over 300 African Americans were burned, killed, and 35 blocks of what was known as the Negro Wall

Street had been burned down by terrorists who descended on that community and literally terrorized it. And so our history is one where we do not take lightly acts of terrorism.

Unfortunately, we didn't have the law on our side. We didn't have anybody to defend us. And so we have had to learn how to even create new law, like through the civil rights movement, to deal with acts of terrorism and crimes against us. We didn't have the luxury of any revenge, and we decided a long time ago that even if we did not have the law on our side, we had to try and act in ways that would be in the best interests of our country and our people.

With 9/11, we are concerned about the way that you have used your power, the way that you have detained immigrants, and we are increasingly concerned about the way that you used the Foreign Intelligence Surveillance Act. When you answered some of the questions, or at page 2 of your prepared testimony, you state that the United States has deported 515 individuals linked to the September 11 terrorism investigation. I assume and certainly hope that if the Department found that any of these 515 individuals were involved in terrorist activities, that the Department would hold them, not simply deport them from this country. Surely you would incapacitate them; that is, you would keep them in a maximum security prison or even in a military facility in order to prevent them from engaging in further terrorist activity. Or, the Department of Homeland Security would do so. Yet your testimony is that these 515 individuals were deported.

So how are any of these individuals linked to the September 11 investigation? To the contrary, isn't it a fact that after you rounded up these individuals, you found that they had no involvement with terrorist activity, but found the problem with their immigration status that provided you a simple legal basis to deport them? Is this what you mean when you say that these individuals were linked to the September 11 investigation, simply that the roundups after September 11 set in motion a chain of events that caused you to discover problems with these persons' immigration status? When you answer that, please refer also to the inspector general's report that talked about holding these people without charge for over a month in unconscionable conditions and unable to contact an attorney or have a telephone call.

Chairman SENSENBRENNER. Mr. Attorney General.

Attorney General ASHCROFT. Yeah. I am delighted to have an opportunity to respond. And let me try and go through the issues in the order in which Congresswoman Waters raised them.

Let me say to you that we are very concerned about anytime individuals are abused in the United States and their rights are not properly respected. Following 9/11, we have had a very aggressive campaign to protect the rights of individuals whose personal security and liberties have been threatened as a result of intimidation or coercion because of their ethnic origin in the United States. Our Civil Rights Division Chief, Ralph Boyd, has aggressively worked to prosecute a number of cases. Those who sought to bomb mosques have been brought to justice. Those who disrupted businesses, those who killed individuals have been brought to justice, and we will continue to do so.

And the Department of Justice is a justice that believes in justice for all, and so even during the most recent military campaign in Iraq, the FBI interviewed thousands of individuals of Iraqi origin to make sure that they knew that we would do everything we could to make sure they were not in any way infringed, their rights weren't, in this country.

You raised the question about individuals who were deported who had—who were individuals that were linked to the terrorism investigation. There are individuals who had strong links to the terrorists against whom we did not have a case that was sufficient to bring criminal charges, or about whom the bringing of the case might result in the revelation of material in court which would be against the national security interests of the United States. And certain of those cases we have to make a considered judgment about what's in the best interest of the United States.

We are—as Congressman Conyers indicated earlier, we are a Nation of the rule of law. It is not within the authority of the Attorney General of the United States to seize and hold people because they are linked. They have to be proved. You know that well. This Committee knows it well.

I'll give you an example, though, that we had an individual who was a roommate of one of the 19 hijackers of September 11, was an associate and friends of another one of the hijackers of September 11, who was an individual who was illegally in the United States. We made a judgment that it was in the best interests of the United States of America that that individual not remain in the United States; that that individual be deported. We had another individual who left New York with a flight manual and pilot's credentials and other things that was illegally in the United States and immediately left on 9/11. We felt that that individual—while we couldn't provide a complete array of facts sufficient to warrant the criminal process incarcerating that individual, we felt that individual—it served our interest that since he was in the United States illegally, that he be sent out from the country. Another individual was an individual in possession of some 30 or more pictures of the Twin Towers of New York and jihad materials, an individual that we felt as a result of his illegal status in the United States should not be allowed to stay in the United States. There were insufficient grounds to prosecute the individual. There were not—there was not a basis for taking other action. We felt that that individual ought to be deported.

None of the individuals that were the subject of the report of the Inspector General, none of those individuals was in the United States legally. All of them were illegally here. The Justice Department made a policy decision that they were here illegally; that they were—our awareness of them was developed in the context of investigation of the 9/11 situation, and that it was our responsibility to make sure that we either deported them or cleared them before we released them.

Ms. WATERS. Mr. Attorney General, how many of the five——

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Ms. WATERS.—were linked to September 11?

Chairman SENSENBRENNER. The Attorney General will answer the question, and the Chair will then recognize the gentleman from Florida, who is next in line.

Mr. Attorney General.

Attorney General ASHCROFT. Well, I—maybe I should, in deference to other Members of the Committee, not give the complete answer. Someone else may want to raise this issue.

Chairman SENSENBRENNER. You are perfectly free to give as complete an answer as you desire to the question of any Member of the Committee. When the red light goes on, the questioner will not be recognized again for another question, but you will not be taken off your feet with the gavel. Go ahead.

Attorney General ASHCROFT. Mr. Sensenbrenner, Chairman, I appreciate that. It almost reminds me of my days in the Senate when they said only God could take the floor from a Senator. And some people were praying mighty hard when I was on the floor.

Let me just say this: That all of the individuals, the subjects of that report, were in the United States illegally. The policy of the Department, for which we do not apologize, was that until individuals apprehended who were here illegally, who have no—don't have a right to bail or bond, who are here illegally, before we would release them prior to their deportation, we wanted to have them cleared. We believe that's the right policy to protect the American people.

You've got to remember the FBI in New York, for example, at that time was working out of a parking garage because we assigned so many people to New York to try to solve those problems. We made interest judgments about the best national security interests of the United States when we couldn't prosecute—some individuals we did prosecute. Other individuals who couldn't be prosecuted, we simply had to say we'd better deport these people with the clear understanding they are never to come back to the United States.

Now, you raised an issue which is important. The Inspector General indicated that there were some cases among the 700 plus individuals where there were accusations of abuse in the prison system. We do not stand for abuse, and we will investigate those cases. There are 18 cases that were brought to our attention. Fourteen of those cases have been investigated. The investigation is ongoing, although in 14 of those cases the Civil Rights Division has indicated that it did not find adequate predicate to bring criminal charges in those cases. The other four are going to be continued to be investigated. We don't tolerate violence in our prisons, generally. We don't tolerate violence in holding individuals. That's not a policy of the Department, and in those situations we'll seek to correct those situations.

And I'll make a last point about the Inspector General's report. The Inspector General is a valued member of the Justice Department. He keeps giving us information that helps us improve our operation. But, the Inspector General reminded us in previous reports that when people were not detained after they were apprehended as illegals in this country, 85 percent of them did not honor the deportation order. They just slipped back into society. We could not afford, in a setting where individuals were clearly associated

with the investigation regarding terrorism, to let those individuals be back in the public so that 85 or more percent of them could merge back into the American culture.

The last point I would make, and I'm sorry that my answer has been a little disjointed on this, in all of the conduct of the activities of the Justice Department, we have not violated the law, and we will not violate the law. We will uphold the law. If there are ways for us to improve the way in which we uphold the law, we are interested in doing so and will work together with the Inspector General to do that as we have in time after time; but, you know, previously criticized us because we don't hold people that went out and committed crimes, whether it was the serial murder in Texas, or whether it was the other situations where individuals were not detained. In this case, we simply said that given the nature of this activity, terrorism, given the circumstances in the country, given the fact that illegals ordered for deportation are not entitled to be released, we did not release them.

Chairman SENSENBRENNER. Thank you.

The gentleman from Florida Mr. Keller.

Mr. KELLER. Thank you, Mr. Chairman.

And I thank you, Mr. Attorney General, for coming before us today.

A 19-year-old young man goes down to a local record store. He takes 10 of his favorite music CDs and 10 of his favorite movie DVDs and puts them into his gym bag without paying for them. Has he committed a crime? Absolutely. Will he be prosecuted? Yes. So what happens in real life is that the same 19-year-old kid goes home, uses his computer to log on the Internet, steals the exact same 10 CDs, exact same 10 DVDs, using a peer-to-peer service such as KaZaA. Has he committed a crime. Absolutely. It is a felony under the Federal No Electronic Theft Act passed by Congress in 1997. Will he be prosecuted? Probably not. The Justice Department has never prosecuted even one person for stealing music or movies through these peer-to-peer services. On the other hand, your Department does deserve substantial praise and commendation for its success in Operation Buccaneer, which, among other things, has had success in going after the code crackers who break the codes of these DVDs and other software programs.

Now, this type of peer-to-peer crime that I have been mentioning, the theft of music and movies over the Internet, is not something that happens just once in a while. It happened over 230 million times last year alone. That's according to KaZaA itself. The witnesses who are sympathetic to those types of crimes appear before us and essentially taunt us saying, we don't need any new laws from Congress. There are already existing laws on the books. There's just no enforcement of them. You need enforcement, not new laws.

And I bring this up because this problem has very serious consequences for our economic growth and job creation. The U.S., as you know, is the world's largest producer and distributor of copyrighted materials. The copyright industries account for 5 percent of our gross domestic product, and the major employers in my district in Orlando, such as Disney and Universal, are among the biggest victims of Internet piracy of music and movies. In fact, the problem

of taking copyrighted materials was so important, our Founding Fathers placed the protection of intellectual property right in the Constitution, article I, section 8, clause 8.

So in July of last year, I and 18 of my House and Senate colleagues wrote to you encouraging the Department of Justice to bring prosecution against operators of peer-to-peer systems who intentionally facilitate mass piracy, and against individuals who intentionally allow mass copying from their computers over peer-to-peer networks, and as far as I can tell, there has still never been a prosecution of a single peer-to-peer pirate.

So, Mr. Attorney General, my questions to you are simple. Why hasn't the Department of Justice prosecuted anyone for stealing music and movies through these peer-to-peer services, and when, if ever, will you see the Department bringing a copyright infringement case against an online peer-to-peer pirate?

Attorney General ASHCROFT. Thank you very much for the question.

Let me just say this: That we take intellectual property very seriously. It's a competitive advantage that the United States has. As nations develop higher and higher skills, and their ability to do things progresses into the concept arena and beyond just the implementation or manufacturing arena, those intellectual achievements need to be protected. And over the past several years, we have begun to implement intellectual property units across the Nation. We have now 13 of them. You have helped do that. They work in conjunction with the Criminal Division's Computer Crimes and Intellectual Property Section.

We have, to date, convicted 22 individuals domestically for conspiracy to violate the copyright laws. The case law has recently made clear that the peer-to-peer copying is, in fact, illegal. There was a time during which that was in doubt, and I remember when I was on the Hill, there were people trying to have new laws passed, and some remediation was made.

I have met with industry leaders to discuss this problem which you have raised. Our working to convict individuals has resulted in substantial sentences for those I mentioned from 33 to 46 months, and I have no doubt, in my mind, that there will come a time when we will be able to talk about successful convictions against those who thwart the copyright laws of the kind of activities you represent. We do not have any cases that have been completed at this time and for me to make comments on others would be inappropriate.

Chairman SENSENBRENNER. The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you very much, Mr. Chairman. It is good to have you here, Mr. Attorney General.

Look, I think the Congress has demonstrated on a bipartisan basis our commitment to join you and the Administration in this battle against what you described accurately as a fanatical and ruthless enemy while at the same time, using your words, honoring the Constitution and respecting the rule of law. We have authorized two military campaigns in the use of force, we have passed the PATRIOT Act, we have appropriated money, we have done the most massive reorganization of the executive branch premised on

the need to be more effective, not simply at prosecuting, but at preventing terrorism.

I appreciate your response to the Chairman in the context of the consultations with the Congress and even your comments with respect to the Inspector General. I mean, what concerns me, when the Inspector General provides a list of institutional failures at DOJ, prolonged detentions without charges; a policy referred to as hold until cleared that led to average detentions of 80 days, but sometimes up to 200 days; a policy of obstruction of access to counsel; and an unwritten policy of denying bond for all aliens, a policy not restricted to suspected terrorists; some of that is very troubling.

The Department of Justice spokesman says, in quite a defensive articulation, "The Inspector General report is fully consistent with what courts have ruled over and over, that our actions are fully within the law and necessary to protect the American people. We make no apologies for finding every legal way possible to protect the American public from further terrorist acts."

I find that kind of response troubling and somewhat different than the one you took in response to Ms. Waters' question where you are recognizing Inspector General as a legitimate institution, and presumably the Congress as well, in terms of participating in this war. You discussed changes you would like, and one of them you mentioned was this whole issue of pretrial detention in the cases of people charged with terrorist acts. There are arguments for it. There are always concerns about pretrial detention in the context of presumption of innocence. But a policy of no trial detention is much more problematic. And I would like to get down to a specific of the PATRIOT Act.

In response to the Department of Justice's concerns, we gave the Department a longer period of time to hold someone that you have certified as a suspected terrorist, giving you up to 7 days to hold such a person. The previous law had allowed this for 48 hours. The Justice Department signed off on that change and, of course, that provision was signed into law by the President. Now we find that you have never once used this expansive power that the Congress provided, and apparently without any need, because previously you drafted a regulation on custody procedures that has gotten around the reporting requirements and the time limits leading to the conclusion that, in many cases, there are average detentions of 80 days, sometimes up to 200 days without either a criminal charge or an order of deportation.

Once you order deportation, you have an additional 90 days to determine whether or not to bring criminal charges. It is in this area of not restricted to suspected terrorists, but anyone you happen to pick up where you hold them, you don't charge them, and you don't seek their deportation that some of us find that the collateral damage may be greater than it needs to be in the conduct of this war, and I am interested in how you intend to pursue some of the Inspector General's reports and deal with the issue of the provisions in the PATRIOT Act rather than the regulation promulgated by the Department before the PATRIOT Act was passed.

Chairman SENSENBRENNER. Mr. Attorney General.

Attorney General ASHCROFT. Congressman Berman, thank you.

Let me just indicate that you talked about we didn't have a criminal charge on these people and we didn't have an order of deportation, as if those are the only things that we might need to detain a person. A person can also be detained on a civil charge of violating the immigration laws. So persons who are charged with violating the immigration laws are not criminally charged nor may there have been an order of deportation that has been issued, but it is still a reason to hold people pending the adjudication of the immigration charge.

Mr. BERMAN. But you only have 7 days on that.

Chairman SENSENBRENNER. The gentleman's time has expired. The Attorney General will answer the question.

Attorney General ASHCROFT. The 7-day period, as you properly mentioned, Congressman Berman, is upon the determination that a person is a suspected terrorist by the Attorney General who makes that decision. There are other ways in which people can be charged with immigration violations and detained. The report indicates that some people were held too long without being charged with immigration violations, but to say that those were the 90 and 180 day periods is, I believe, inaccurate.

Some people were not charged immediately with immigration violations. That is something we would like to improve the record on, but no person that I am aware of, none was ever held more than 30 days without a charge in that respect.

The references in the report to people being held for periods of 90 or up to 180 days are references to people who were charged with immigration violations, some of whom had been adjudicated as deportable, and some of the complaint was that they were held after they were ordered deported, but hadn't yet been deported.

I made previous reference to other Inspector General reports where the INS and the Department had been criticized for letting people go out on bond after they were ordered deported because when the deportation time came, they didn't come back. The average is that 85 percent of all people who are let out on bond after they have had a deportation order or are in custody based on their illegality and awaiting deportation, if you let them out, they evaporate. This Congress has called me to task before when I had the responsibility of the Immigration and Naturalization Service, which has now migrated itself over to the Department of Homeland Security, and called me to task because there are some 320,000, were at that time; there may be more than that, of these people who were ordered deported, but they were let out instead of maintained in custody, and they merged back into society.

Given the fact that these were a category of individuals associated with this investigation, we felt that before we released a person in this setting, we should have clearance, and so we asked the FBI to help clear these individuals. God forbid if we ever have to do this again, we hope that we can clear people more quickly. We would like to clear people as quickly as possible.

There is no interest whatsoever that the United States of America has in holding innocent people. Absolutely none. It is costly. It takes up resources. It makes it difficult for us to do what we need to do with other people who are threats. But we felt in the aftermath of that event, with the idea that even from the general popu-

lation that 85 percent abscond and just take off if they are let out and don't show up for their deportation, can't be found, we ought to be more cautious in this setting, given the circumstance, and frankly, that is a caution which I think was well taken. Can we do a better job? I would hope that we will also continue to do a better job in everything we do. And our effort in that respect is something that we will continue to try and improve.

Chairman SENSENBRENNER. Thank you, Mr. Attorney General.

The gentleman from Wisconsin, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman.

Attorney General Ashcroft, first a word of appreciation and gratitude. Your assistance in the development of the child abduction legislation, your assistance and work on the DNA database concepts which are coming forward soon in legislation is greatly appreciated. Without your leadership, I don't think that those would come to fruition, so I appreciate that very much.

Question: I refer you back to your initial testimony, and right toward the end of your testimony, you said something which caught my attention. You began to identify weaknesses in the PATRIOT Act, or perhaps things that weren't complete that could use more attention, and one of them dealt with support for terrorism. I think you referenced training.

Could you expand upon that a little bit? I would appreciate it.

Attorney General ASHCROFT. Thank you very much.

One of the charges that has been effective in the war against terror has been to charge people with material support for terrorism, that they have become a part of the terrorist operation in supporting it. We think that going and joining the operation is providing material support. A number of courts have agreed with that, that it is material support.

There are some courts, though, that say going and taking training and joining up with the operation does not mean that you are helping the operation. Well, our view is that that could be clarified. We had individuals, I am sorry to say, in the United States of America who after September 11, went to get terrorist training. We had individuals in the United States of America who after September 11, left the United States of America in an attempt to go and fight against our own Armed Forces in Afghanistan. It is hard to imagine. It is. I think it is hard to imagine for anyone on the Committee. I mean there are differences between some of us on this Committee and in this room, but I don't think there are any differences in that respect.

But we need for the law to make it clear that it is just as much a conspiracy to aid and assist a terrorist, to join them for fighting purposes, as it is to carry them a lunch or to provide them with a weapon.

Mr. GREEN. Agreed, most definitely.

Let me switch gears on you.

There is a lot of misunderstanding out there in my view on the PATRIOT Act, and one of the matters that we hear about and read about the most is with respect to library records, who checks books in and out, different library materials, and the ability for the Federal Government to monitor those activities, to seize library records.

Could you tell me how the passage of the PATRIOT Act changes or changed the ability for the Federal Government to monitor library records and materials and those who use them or to obtain those records?

Attorney General ASHCROFT. Let me try and put this in context. Grand juries have been able to subpoena business records for a long time. And among those business records grand juries have been able to subpoena, and law enforcement officials have been able to look at are records from libraries. They have done it effectively to secure the safety of the American people over and over again. That is not FISA related, that is simply the fact that this has been history.

Not long ago, according to press accounts, Brian Regan, a Defense Intelligence Agency employee, was convicted of espionage in Alexandria, Virginia. He extensively used computers at five public libraries in Northern Virginia and Maryland to communicate with foreign governments, communicating with the foreign governments. FBI agents followed him into the library and watched him do it. It didn't take FISA authorization or coverage; it was a matter of pursuing a criminal activity.

We remember the Unabomber. Some may remember that the capture of the Unabomber was made possible because the Unabomber had this manifesto that he sent out and he gave people, and in that manifesto he quoted a number of rather esoteric treatises. The investigators subpoenaed records from libraries and they developed an awareness of who had looked at these esoteric treatises and that helped lead to the detention and capture of the Unabomber.

The Zodiac gunman in Queens, New York. Profilers decided that this person very likely was enchanted with a Scottish cult poet. So they went to find out who checked out the books. Gionni Versaci's case also involved—so library records have been a part of criminal investigative procedures for a long time. They take a subpoena from a grand jury.

Now, for foreign intelligence, should we be able to use tools in foreign intelligence that we use in other criminal proceedings? I think most Americans say hey, look, intelligence relating to counterterrorism is very important. We ought to be able to do that. So the PATRIOT Act authorized some very limited things regarding libraries.

First of all, you should know that in order to get a subpoena in the general law enforcement community, it is issued by a grand jury. It is subject to being challenged in a court and having a court rule on it, but before a FISA court issues authority to get library records, the court itself actually has to look at the case and say, this is warranted, and, in so doing, with that court order has an extremely narrow scope. It can be only used to obtain intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities. So it is not available for general criminal use.

Of course, section 215 in the PATRIOT Act goes on to also say that the FBI cannot conduct investigations of a United States person solely on the basis of activities protected by the first amend-

ment to the Constitution. So the FISA approach to libraries is very well encased in protections.

Now, there has been a lot of disinformation about it, and there was a suggestion at one time by a newspaper, for example, it got a lot of coverage in the Hartford Courant, that alleged that the FBI had installed software on the computers of the Hartford Public Library that lets agents track a person's use of Internet and e-mail messages, and the article even said that an individual's library use could be surveilled even if they weren't suspected of being a terrorist.

Well, as a matter of fact, the FBI obtained a single search warrant to copy the hard drive of a specific computer that had been used to hack into a business computer system in California for criminal purposes. That is totally different than the FISA situation. No software was installed on that computer. The Hartford Courant has retracted the story in full, but these problems persist.

I believe the American people expect us to be able to pursue terrorists with the same intensity that we pursued Gionni Versaci's killer, the Unabomber, the other kinds of criminal activity.

I think you did a good job in passing the PATRIOT law. It contains more safeguards. You don't get an order until you have already been before the judge there. In the grand jury traditional subpoena area, the grand jury issues subpoenas, and only if it is challenged and resisted, do you go before the court in a motion to squash the subpoena or else a motion by the law enforcement authorities to enforce the subpoena.

So as it relates to the privacy of the American citizens, I think the protections are superior in the PATRIOT Act than they are in other arenas. It is a limited approach. It is safeguarded by judicial supervision, and it obviously relates to a matter of great risk to the American people.

Mr. GREEN. Thank you.

Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman.

Mr. Attorney General, you last appeared before this Committee some 18 months ago and asked us to enact the PATRIOT Act. At that time we were all struggling to absorb the magnitude of the assault on the country and the loss of innocent lives.

Now, those are tough circumstances in which to find the proper balance between national security and the freedoms and the values which define us as a people. That is why the Committee insisted that the PATRIOT Act include a provision to sunset many of the new powers granted to the Government to conduct covert surveillance.

Now today, the reality is that many Americans are increasingly uneasy about some of these measures. As you indicated, libraries and book stores have launched a campaign to overturn section 215, and scores of cities and towns across America have adopted resolutions opposing the PATRIOT Act.

To understand their concern, we only need to remember the Carnivore Program, the TIPS informant scheme, and the Total Information Awareness Project to understand what the American people are worried about. Our courts have rebuked the Government for its

blanket closure of deportation hearings and its denial of counsel to persons it has designated as enemy combatants and, as has been indicated, your own Inspector General has criticized the treatment of detainees.

It appears that the Government or the American people feel that the Government is intent on prying into every nook and cranny of people's private lives while, at the same time, doing all it can to block access to Government information that would inform the American people as to what is being done in their name.

As Judge Keith wrote in the *Detroit Free Press* v. *Ashcroft*, and I am quoting now, "Democracies die behind closed doors. When Government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."

Yet, the Department of Justice has persisted at withholding information from the courts, congressional Committees, and the public. It has made novel and sweeping claims of executive privilege and, I submit not to protect the national security, but to shield officials from embarrassing revelations. For months, the Department stonewalled while the Government Reform Committee sought 30-year-old documents regarding the mishandling of FBI informants in Boston. And just this week, the Department refused to release its long-awaited report on the Wen Ho Lee affair.

This picture presents a Government obsessed with secrecy, of a culture of concealment, as Senator Grassley has described the FBI. Fortunately, even the Department of Justice can't maintain absolute control over information. And so while your officials were denying plans to expand the powers granted by the PATRIOT Act, someone within the Department leaked the document now known as PATRIOT 2. As has again been stated, your own Inspector General issued a scathing report on the prolonged detention of hundreds of people who had no link to terrorist activities, yet rather than acknowledge that excesses may have occurred, your spokeswoman said, and I am quoting, "We make no apologies for finding every legal way to protect the American people from terrorist attacks."

Now, you are well aware that prosecutors have enormous power in our democracy and surely, no modern prosecutor in modern history has been granted as much power as you now hold, and such immense authority should be wielded carefully and with restraint.

You said in your statement, "We must not forget that our enemies are ruthless fanatics", and you are right. We all agree with that. But the solution is not for us to become zealots ourselves so that we remake our society in the image of those that would attack us. Then we have given them the victory that no one here wants them to achieve.

Let me conclude with this question, Mr. Attorney General. Would you comment on the rationale for not releasing the report on the Wen Ho Lee matter?

Attorney General ASHCROFT. Let me just make some remarks. First of all, the rationale for not releasing anything is the national interest. There are lots of times, especially in international intelligence, security matters, when we don't release things because it is not in the national interest to do so. And the idea somehow that

the Department is stonewalling to protect what happened in the Department 30 years ago, with all due respect, Congressman, that is an absurd idea. I have no interest in protecting what happened 30 years ago. I have an interest in developing a capacity to seek the safety of the American people tomorrow.

We don't even have an interest in protecting what happened 30 minutes ago, because our interest is in the future and making sure that we keep the American people safe. And our objective is to improve the operation. That is why I welcome the Inspector General. You can talk to him if you care to. He and I have a very good relationship. I have instructed him to be very candid with us to help us build a road map for a better Justice Department. That is what my job is and that is what his job is, and that is why we hold these hearings. So I am pleased to respond to these items.

We should be careful and we should be restrained, but we should also know that we, in our care and restraint, have to be realistic. So I just want to make very clear that this Department will do everything it can to improve its performance, and if there are ways in which for us to improve the law, we hope that we would confer with you about that.

I tend to find it amusing when it is suggested to me in the Congress that I have a secret plan to change the law. Now, I came to Congress as a young child and they gave me a little pamphlet that said how a law is made, and nowhere in that pamphlet did it say the Attorney General could secretly change the law. I can assure you that in the event that the law is changed, this Congress will be involved in it and I won't have a vote on it.

I used to be a Member of this Congress; I enjoyed the opportunity of casting votes. I miss it sometimes. And I would do my best to assist the Congress. And when it adapts the laws to reflect the need to confront the evolving threat against the safety and security of the American people, that it does so in ways that will be effective. That is what my job is as Attorney General. And to the extent that I can do that, I am going to do it, and I can pledge to you today that that is the way in which we will operate in terms of changes to the law. That is the constitutional way.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

General Ashcroft, welcome, and thank you for the dedication and integrity that you have brought to our Nation's chief law enforcement position. It is very refreshing.

The gentleman from Wisconsin noted the confusion and concern that the U.S. PATRIOT Act has engendered in many quarters. In fact, as you may know, a number of cities have passed resolutions or other measures that ban their employees from cooperating with Federal authorities that are attempting to utilize powers granted by the law.

What, if anything, can and will the Department do to correct these misunderstandings and to assure cooperation from these municipalities, and have you encountered any specific instances where employees of any of these cities have refused to cooperate with the Department?

Attorney General ASHCROFT. Well, first of all, I think information is the friend of the American people, and that is one of the values that the Chairman recited to me and Ranking Member Conyers recited, that when we discuss the law, and we can take some of the myths away from the law, we can show the American people how the law is framed, how the rights of individuals are protected and safeguarded in the law. We will work with State and local authorities very aggressively on PATRIOT Act issues and other issues to help them understand why doing what we are doing is in the national interest, including the local interest. And I would just have to say this, that the overwhelming, vastly overwhelming response of State and local authorities has been excellent.

Mr. GOODLATTE. That certainly has been the experience in my district.

Attorney General ASHCROFT. And we recently apprehended an individual who had been the subject of a many-year manhunt, not too far from your district, he was in the neighboring State, local law enforcement. When the Portland cell was first, the alleged Portland cell was first discovered, it came as a result of a tip-off by a deputy sheriff who noticed people involved in training activities, and it was in a neighboring State. So an alert went out to an aggressive team of people interested in the security of the United States, including local law enforcement. They are our best friends. And I think as they understand the truth of what the PATRIOT Act is; you know, they might have read the Hartford Courant article which they subsequently withdrew. But you know what they say, you are charged with the offense that is on the front page and the retraction goes in the classified ads. They might not have read the classified ads yet, but we need to make sure that message gets out.

Local governmental officials by and large are very helpful to us. They are on the Terrorism Task Forces, they are on the Anti-terrorism Tasks Forces. We have an entire strategy expressed in the PATRIOT Act for expanded communication and sharing information with State and local officials like never before. The FBI has been retooled as an agency to have local law enforcement officials sit as one of the top people at the FBI to make sure that our relationships are good so that we can get information and we can connect the dots that are assembled, the parts of the puzzle that come from every quarter.

I am concerned about it, but I think we are working in the right direction, and it is going to be just fine.

Mr. GOODLATTE. Let me ask about one other area that is of great interest to myself and to you, I believe. When you were Senator Ashcroft, you joined with me on the Senate side in pushing forward legislation which assured that American citizens would be secure in the use of their computers by promoting the use of strong encryption, getting an ancient Government policy reversed which has assured privacy, has assured the ability of individuals to fight crime, and for U.S. software and hardware companies to be able to be competitive in the world market in offering their products.

I noted with pleasure that this was not sought by the Justice Department as a part of the PATRIOT Act, and I would hope that we could have your assurance that you will continue to support the im-

plementation and use of strong encryption without back-door keys being mandated into the computer systems of Americans to assure their privacy, to ensure their ability to fight crime, and to ensure our competitiveness in the world.

Attorney General ASHCROFT. Let me just say how grateful I am that there are people with your understanding of the computer world in the Congress who guide and shape intelligently the way in which this world is dealt with governmentally, and we hope that voices that have that kind of intelligent approach speak into this Administration as well as the Congress.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Attorney General, we appreciate you being here. Let me just observe first that you said a few minutes ago that the Unabomber, for instance, was caught, was apprehended because of looking at his library—at information from the library. My recollection is that he was caught because his brother turned him in, that his brother turned him in, not because of anything from the libraries. So I hope, and you may wish in the interests of clarification after this Committee hearing to clarify that statement.

But let me ask you two other questions. What disturbs me about what is going on is that we all know the necessity for apprehending a terrorist and for prosecuting a terrorist and for preventing terrorism, that is obvious. We also know the history of this country in that in some of our previous wars we have done things that have trampled civil liberties, we have done them in the name of national security, and then we have apologized for them. The historians write that they didn't, in fact, aid national security. The internment of the Japanese-Americans during World War II, for example; the Alien and Sedition Acts, but they did trample civil liberties at the time, and I am wondering if we are not doing some of the same type of activities again. I refer you to two things.

The Justice Department claims in briefs before the fourth circuit and other courts that the President has the untrammeled power to designate anybody, any American citizen as an enemy combatant, and that the courts lack the jurisdiction to question his determination. That would give the President the power on his say-so or really, on the say-so of some bureaucrat, because he doesn't do the investigation, to imprison any American or anybody else forever with no legal process, no due process, not even a writ of habeas corpus. That is the claim of executive power that except for Mr. Mugabe, nobody in English-speaking jurisdiction has made since before Magna Carta.

So that is my first question. And how do you justify a claim of power which says the courts cannot review the President's determination to put someone in jail with no legal process and keep them there forever, number one.

Number 2, this morning's Washington Post very carefully sums up a second claim of power and says the following, and I am reading excerpts from the editorial. "in all criminal prosecutions, reads the sixth amendment to the Constitution, the accused shall enjoy the right of compulsory process for obtaining witnesses in his favor. All criminal prosecutions, according to the Justice Department, ex-

cept that of Zacarias Moussaoui, who is on trial for conspiracy in connection with the September 11 plot. Mr. Moussaoui, the Government argued this week before the U.S. Court of Appeals for the fourth circuit, can be tried, convicted and put to death without being able to take testimony that might help his defense from a man whom the military is interrogating abroad and refuses to produce.

The sixth amendment compels the Government to produce witnesses in its custody who the defense wishes to call. Yet when the enemy is al Qaeda, apparently almost any rule is subject to negotiation."

The editorial then proceeds to acknowledge, quite correctly, that there is an interest the Government has; it says if it produced this witness who might have exculpatory information that would stop him from being interrogated, and the Government has real interest in interrogating him. Fine.

The Post then says, alternatively, the Government could drop the case against Mr Moussaoui and either hold him as an enemy combatant or try him before a military tribunal. In other words, what the Post is saying is that if it is inconvenient for the Government because of contrary considerations to allow a defendant to have the benefit of a witness who might say he is not guilty, then the Government can try that defendant in a military tribunal and not have the benefit of that witness, so you can put to death somebody who might be innocent for lack of the testimony of someone who would establish innocence, or you could hold him as an enemy combatant forever and not bother with a trial.

So my question is, are you claiming the power to hold people forever without benefit of trial, without benefit of due process, without benefit of habeas corpus, just because you say he is an enemy combatant, and are you claiming the power in the American courts to say because it is inconvenient or not even—more than inconvenient, very damaging to the Government, we won't bother with the sixth amendment right to produce a witness who may show a court that the defendant is, in fact, innocent.

Attorney General ASHCROFT. Thank you. Those are important questions.

Mr. NADLER. They sure are.

Attorney General ASHCROFT. I want to answer them. And you are as good as you are on TV.

Mr. NADLER. Thank you.

Attorney General ASHCROFT. The first, if I am not mistaken, the first question is about holding people as enemy combatants.

Mr. NADLER. Holding them indefinitely and asserting that the courts have no jurisdiction. That is what the Justice Department brief said. The court has no jurisdiction to decide whether the President is right or wrong that Joe is an enemy combatant, or maybe, in fact, the enemy combatant is Joe's brother, who looks like Joe. I mean but just even to identify him, the courts have no jurisdiction.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. Attorney General.

Attorney General ASHCROFT. Thank you. I thank the Chairman and I thank the Congressman. The ability to hold a person as an

enemy combatant is a well-established capacity, not invented recently, but a part of every presidency that has ever gone into—been a part of a conflict. The Article II powers of the United States Constitution relating to the right of the President to protect a nation are substantial, and to apprehend and detain those that are fighting against the United States has not been a matter of controversy.

Individuals who fight against the United States in a time when the United States is in conflict have always been detained and they are detained for the pendency of the conflict, not by the Justice Department, but by the Government of the United States seeking to defend itself. The powers of the President, not just the powers, but the duty and responsibility of the President to defend himself.

I think the best legal authority that sums this up is the Quirin Case which was at the end of the Second World War, and it provides that there is a right of habeas corpus for such individuals in some settings, but the current litigation about which I am sort of stumbling because I don't want to make an argument here instead of in the courts. Generally when we have current litigation, we limit our remarks to those in court, but I want to try and give you our position here.

I think the Fourth Circuit Court of Appeals has said that once the court has established that the President has a basis for making his decision, that the court will not look beyond that. This is not a judicial proceeding, it is not a criminal proceeding. The rights relating to criminal defendants are not necessarily here, nor should they be. No one I think would argue that every enemy combatant that is taken in a war should have a lawyer. The idea that during any of our major conflicts, we give every prisoner of war a lawyer is one that simply has not been——

Mr. NADLER. But the question if someone is taken on an American street, not in combat.

Chairman SENSENBRENNER. The gentleman from New York's time has expired. The Attorney General will answer his question and then we will move on.

Attorney General ASHCROFT. You know, the last time I looked at September 11, an American street was a war zone. It was a street in Virginia that was a war zone, there were streets in New York that were war zones. And the individuals in the Quirin case were taken from American streets. You will remember the Quirin case was in the Second World War where individuals had come to the United States with a view toward blowing up American buildings and they were apprehended in the United States, and detained as enemy combatants.

So this President is acting in the same way to defend American interests that American Presidents have had from the beginning of this Nation. When a person is part of a war against the United States as a combatant against the United States, that person is subject to detention under the power of the President to protect the United States, and the courts have not interfered with that in any significant way. And I don't think the courts will. I think there is, in that kind of time of peril, there is that responsibility and duty of the President.

The second question, and I haven't read the Post today, and there are days when I don't read the Post, that talks about a spe-

cific case that relates to an individual. And there is an issue that relates to whether an individual—how an individual will be able to address the evidence in the case against him.

Now, the Congress has widely assembled what is known as the Classified Information Procedures Act, CIPA, and I suspect this Committee was very involved in the development of it. And when you passed that Act it was a way for information to be used at trial and still protect the interests of the United States, the security interests of the United States. And CIPA is a set of mandated procedures according to the law which says that the court will do everything it can to substitute summaries or parts of depositions or various things to allow the trial to proceed in fairness. And the United States uses the CIPA Act in trials whenever the interests of the United States might be seriously adversely affected by the revelation of certain materials in trials that are classified, and that is the process in which we are involved in the Moussaoui case.

Now, I wanted to address another couple follow-on questions, and that is you said, well, why not just take these people and lock them up as enemy combatants. I am glad to know that as you progress through your arguments you now approve the enemy combatant thing.

Mr. NADLER. I didn't say that.

Attorney General ASHCROFT. I thought you said that. That was my recollection. I withdraw that. We will let the record reflect. We will leave that up in the air.

The second thing you said, why not try them in a military tribunal. Or maybe the Post said that. Maybe you didn't. Then I won't bother to give you the reasons. Well, let me give you the reasons anyhow, in case you were wondering, even if you didn't speak, and I would yield some of my time back to him.

Chairman SENSENBRENNER. Go ahead. That is a legitimate issue, so go ahead.

The gentleman's time has expired. Let the Attorney General finish his answer and then I will recognize the next person in line.

Attorney General ASHCROFT. Okay. Well, in case anybody was wondering, there are reasons to establish an ability to try people in Article III courts under the CIPA Act. And one of the reasons is when people are apprehended overseas, our ability to extradite them and bring them to justice is more likely if they are to be dealt with in the Article III court proceedings than it is if we are telling our foreign counterparts who are holding those individuals, send them over here, we will put them in a military tribunal. For us to have a credible approach to demanding justice for those who inflict terror on America, we need to be able to say, if you cooperate with us, foreign power, and you send us your people, they will be—they frequently demand that they be addressed in the Article III context.

So I find some of the arguments that are common in this discourse to be rather superficial. I know that you were quoting a newspaper and I don't want to make comments about their article without reading their article, but there are considerations which are at the secondary and tertiary level of analysis that relate to the national interest, and those, thankfully, those items come into play when the decisions are being made about these issues, whether or

not they come into play when the articles are being written. And I think the national interest of the United States is worth defending in this setting, and we have to be able to understand that we want to be able to extradite from foreign soil individuals who have inflicted great injury against the United States and in order to do that, a number of our foreign counterparts are going to demand that they have Article III judicial process and not enemy combatant or military tribunal standing.

Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Hostettler.

Mr. HOSTETTLER. I thank the Chairman.

General Ashcroft, thank you for being here and thank you for your service to our country. I believe that the Office of Inspector General report does a grave disservice to yourself and all of the other dedicated Justice Department employees who work tirelessly to protect us from another devastating terrorist attack in the days immediately following 9/11. While the report pays lip service to the incredible stresses that you as well as the men and women of the Justice Department faced and the responsibility that all of you bore for thousands of American lives, it attacks your response to the terrorist strikes even after we have learned the stunning success of your efforts.

There has not been another major terrorist attack on American soil since 9/11. The credit belongs largely to you and the Department. I am not sure that we would be in the same situation if you had been constrained by the inconsistencies brought out by the Office of Inspector General.

General Ashcroft, I have at least two questions that I would like to get to. The first one is a relatively safe yes-or-no response, and the second one you may want to comment on in detail. But the Inspector General, in his report on 9/11 detainees states, "Nearly all of the 762 aliens examined violated immigration laws." Weren't all of the detainees covered by this report illegal aliens, that is, aliens who were in violation of the immigration laws?

Attorney General ASHCROFT. We believe that every one of the individuals detained was in the United States illegally.

Mr. HOSTETTLER. Thank you. The next question, the Office of Inspector General is offended that illegal aliens detained in the terrorism investigation were not released until cleared of involvement with terrorism, and that it took the FBI an average of 80 days to clear the aliens.

The Inspector General recommends that the FBI impose deadlines on agents to complete background investigations, and that point is important, because even the Inspector General recognizes that the Department is acting within statute as well as Supreme Court precedent when it comes to your detention of these illegal aliens. It appears to me that the Office of Inspector General is more concerned about the inconvenience suffered by illegal aliens who are being detained than about ensuring that not one alien terrorist is released on to our streets.

It follows that it seems that the IG may be suffering from short-term memory lapse. Just this February, the IG issued a report that found that the Immigration and Naturalization Service, which was previously in the Department, only succeeded in removing 13 per-

cent of nondetained aliens in removal proceedings after they were ordered removed. You were being conservative earlier when you said 85 percent absconded. And that is all right with me personally for you to be conservative, but it was actually 87 percent had absconded, according to the IG. Yet this week's Inspector General report spends much of its time ruing over the fact that the illegal aliens who were detained as part of the terrorism investigation didn't get an opportunity to be bonded out.

Would you please comment—and in fact, the IG report of February said that, "We found that the INS is even less successful at removing nondetained aliens from countries identified by the U.S. Department of State as state sponsors of terrorism. During the period we reviewed, we found that the INS removed only 6 percent of those from terrorist states that were not detained."

Would you please comment on this seeming inconsistency between the IG's February 2003 report and the April 2003 report by the same Inspector General?

Attorney General ASHCROFT. Obviously, in an ideal world, we would like to be able to have cleared people instantly. We would like to know any time someone is charged in the very shortest period of time, whether innocent or guilty, or whether they were associated with terrorism or not. And I have some sympathy for the Inspector General's desire to have us do a quicker job. I think all of us in the ideal world would like jobs done more quickly. But as I mentioned earlier, much of this focused in the New York community, and you have to remember what the situation was in New York when this was happening, was still smoldering. The FBI was operating out of a parking garage following alot of leads and uncertain about what might happen next, not only what happened last. And in addition to those individuals who had been detained, there were a lot of other individuals that were individuals about whom we had serious questions and we, on a daily basis, get information about the potential of attacks.

I start every day with a briefing from the CIA and the FBI that says, these are the things to be concerned about today, and I have to say that never on that list of things that the CIA, about the potential of attacks, was the idea that we had to clear these others, although we knew that we did. And we worked hard to clear them and did, but it has to be understood that it was in that context. And obviously, the previous report shows what might have been the consequence of releasing people. It says that from terrorist-sponsoring nations, 94 percent of them don't abide by the deportation order.

Now, mind you, that every one of these individuals was a violator of the immigration laws. So they were already law violators. You put that in context. And none of them has been an individual who was cleared of any violation of the immigration laws, to my knowledge.

So I think we just had to balance the risk. The risk of sending people back into the culture with, according to the statistics of the previous report, 94 percent of one cohort and 87 percent of the other. I did use—I was doubly conservative. I knocked it all back to 87 and I subtracted 2. You would think I was negotiating to buy something, driving the price down. But that risk, 85 percent, you

know, is a very high level of risk, and so we process these individuals as fast as we can. I hope we can do better.

But we did not violate the law, and we will—frankly, I like to view the report of the Inspector General, in spite of the fact that there is tension between this report and the previous report—the previous report criticizing us for not being able to deport people and this report criticizing us for holding people. Yes, there is tension there, but I like to view these as what can we learn from this that will help us improve our operation. And frankly, that is what we are going to do.

But I hope we never have to improve it in a setting like we found ourselves before, and frankly, we never will, because the United States of America is so much better prepared fundamentally to deal with these situations than ever before, that we may be so well prepared we don't have to. That is why I have my fingers crossed and why I fold my hands every day and pray to God that we don't. And it may well be the case. But it is going to be that kind of determination and preparation that keeps us from having to doing a better job. But if we do, we will do a better job and it probably won't be perfect, but it will be lawful, like this job was, lawful, and it will not violate the law.

Chairman SENSENBRENNER. Thank you.

The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. Thank you, Attorney General, for being here. I know you have been very busy, but I think this hearing is long overdue, because I think the American people want to see the creative tension that you are talking about here and have the sense that this Committee and Congress, in general, is involved in trying to help define what the appropriate balance is between protecting ourselves and safeguarding individual and group rights. And this setting helps to, I think, set the American people at ease, and I want to thank the Chairman and Ranking Member for facilitating this.

I have some global concerns that I want to save until the next opportunity when the Chairman and Ranking Member and yourself work out a process for going into greater detail. Those concerns relate to that balance between individual rights, group rights, and protecting security and decisions that the Government and you yourself as an individual and the President might have the authority to make versus individual rights. But the issues that I want to question about today really come up out of the grass-roots concerns that have been expressed to me by various individuals in my congressional district. One of those four concerns you have already addressed, and I hope you won't spend any more time addressing the issue related to the library situation. That is one of the concerns that individuals in communities have raised.

A second concern is a question about whether there are really guidelines about FBI agents going in to religious institutions and group gatherings, or whether individual FBI agents are just using their own judgments about which ones of those groups to go into or religious groups to go into, because that could be exercised in a way that if it were disproportionately going into mosques, for example, could send some very serious wrong messages.

So I hope you will address the issue of guidelines governing that so that we make sure that there is not disproportionality.

The third question relates to, and this is really the second substantive question, because one of the library questions you have already dealt with relates to the attorney-client monitoring. The question, according to your May 13 answers to the Committee's question, it appears that you are not notifying attorneys and inmates of monitoring their communications if you monitor them without a court approval. And I would like for you to give some more information about what the criteria are on, when you do monitor attorney-client conferences and discussions and communications, because a number of my constituents think very strongly about the attorney-client privilege, and I myself think strongly about that.

And then the final question relates to the Neighborhood Watch Program. In March of 2003, it was reported that you announced the expansion of the Neighborhood Watch Program asking neighborhood groups to report on people who were either "unfamiliar" or "suspicious" or "not normal." And, a lot of my constituents are concerned that that puts people in a really precarious position.

I would like to know what specific terrorist prevention provisions were added to the Neighborhood Watch Program and what criteria you are using and how you are following up on the kinds of tips that you are getting from neighborhood watch programs. I hope that's not too much for you, but I think a lot of people out there are concerned about these basic community issues.

Thank you very much for being here again, Attorney General.

Chairman SENSENBRENNER. Attorney General.

Attorney General ASHCROFT. Congressman, that's not too much, depending on whether you want to miss lunch or whether you want to miss dinner, because I'm pleased to address these issues. And frankly, I want to address an issue which you raised but you requested I not address. I don't know if it's fair for me to do that.

I want to say something additionally about the library issue, that there are certain reporting requirements that the Department has regarding its implementation of FISA authorities, and this Committee and the Department of Justice came to an agreement about the availability of those reports to Committee Members and I know that at least some Committee Members have gone to read those reports to understand clearly what the situation is and how the law has been deployed and implemented. Subsequent to that time of those reports being made available, the House Judiciary Committee issued a press release indicating that it is satisfied with the Department's use of section 215. And I quote, "The Committee's review of classified information relating to FISA orders for tangible records such as library records has not given rise to any concern that the authority is being misused or abused."

Now, this, I think, is a good thing. It's part of the oversight responsibility about which Congressman Conyers made inquiry and made reference. I think the American people need to be assured by those who conduct oversight and so you can be a part of a process in this country that lets people know when things are wrong and when things are right. And I would urge you to avail yourself of the opportunity that comes for Members of this Committee to un-

derstand the actual facts, not the conclusions or the rumors in the newspapers, but actually go get the facts and I think you would probably have to agree—it would be stunning to me if you did not agree—with the conclusion of the Committee that there is no reason not giving rise to any concern that the authority is being misused on libraries.

The second matter that you raised was a matter that related to our guidelines regarding—I want to state this properly because we don't mention the type of religious facility. We don't say synagogue or mosque because we want there to be a uniform treatment, exactly what you say. So our guidelines don't specify that there be one thing for one kind of facility and another for another kind of facility. Our guidelines specify that it just relates to religious facilities. And I've got so much paper here, I'm in the enemy combatant stuff. And that was Congressman Nadler's response.

Chairman SENSENBRENNER. You're not referring to us as enemy combatants, are you, Mr. Attorney General?

Mr. WATT. Mr. Chairman, I'm glad you clarified that because I wanted to get back in.

Attorney General ASHCROFT. No, sir, I'm not, and the Attorney General does not designate enemy combatants. That's a presidential designation or that part of the operation. And he wouldn't do so either. I think I can speak for him in that respect. The old guidelines did not authorize agents to gather information for counterterrorism purposes or other legitimate law enforcement purposes, including visiting public places unless they were looking into particular crimes or particular enterprises. The new guidelines address the omission by providing—and I'll quote the guidelines—"For the purpose of detecting or preventing terrorist activities the FBI is authorized to visit any place and attend any event that is open to the public on the same terms and conditions as members of the public generally." That's the end of that quote.

Likewise, with respect to online places, we authorize people to go online. Now, let me clarify that a little bit further, having found, I believe, the right piece of paper that I'm looking for. Both the old guidelines and the new guidelines require that any investigative or information gathering must be undertaken for legitimate law enforcement purposes. Neither the old guidelines nor the new guidelines provide that religious or political institutions are off limits to criminal investigation if there is evidence that they are engaging in criminal activities. The new guidelines authorize the FBI to visit public places on the same terms and conditions as members of the public generally. This provision does not single out religious institutions for special scrutiny, and it is subject to several specific limitations.

And I think this is where we'll be addressing your concerns. It only applies to public places and events that anyone else is free to enter. It only allows visiting places and events for the purpose of detecting or preventing terrorist activities. Information from such visits cannot be retained unless it relates to potential criminal or terrorist activity, and this authority cannot be used to maintain files on individuals solely for the purposes of monitoring activities protected by the first amendment or the lawful exercise of first amendment rights. Those would be religious rights. So that there

is no record made unless there is a record that is made regarding criminal or terrorist activity.

And I need to qualify that. The agent will keep a record of the fact that he went, he or she went. Wherever they go they have to keep those records. But we do not keep records on noncriminal activity, protected first amendment activity that took place in any place, whether it be a religious institution or a political organization. And the religious institutions or those political organizations are not specified by anything other than the fact that they are—if they are places where the public is available to go, then the rules apply there like they would these other places with this record keeping proviso.

Now, attorney-client monitoring. Pardon me. The Department regulation contains strict procedural safeguards of attorney-client privilege. And here are the safeguards. Number one, inmates must be notified that their conversations will be monitored. Two, the monitoring team will be separated from the prosecution personnel by a firewall. They are not allowed to communicate. Three, the monitoring team will destroy any privileged information it obtains. And four, absent an imminent emergency, the Government cannot disclose any information unless it first obtains a court order.

Let me go back to say why this is being done in the first place. The terrorists know how to work our system. And they know that they are able to communicate through attorneys, and there is some indication that terrorists are trained not only to communicate through their attorneys with the public, but with other terrorists for the achievement of terrorist objectives. The reason to monitor attorney communications with those who are detained is to keep them from continuing to run terrorist operations while they are in jail. The safeguards are substantial. The information is protected by firewalls. The information is to be destroyed. It cannot be released without a court order unless there is an imminent emergency. I mean, if a fellow says at noon so and so is going to be killed or there's going to be a bomb exploding, we have the right to go and safeguard the public as a result of our imminent emergency by disclosing that information. But otherwise it cannot be.

Now, the last question that you raised was a question about Neighborhood Watch. We have a Safe Neighborhoods Program that is designed mainly to curtail the use of guns in the commission of crime. We're up 38 percent in the last 2 years in prosecuting gun crime. More gun prosecutions, more gun convictions than ever before in the history of this country, because of a serious problem with gun crime. In terms of the Neighborhood Watch, generally, asking American citizens to be alert, we just ask them to use their judgment. Frankly, people using good judgment on the airplane when the shoe bomber was there saved the lives of many, many people. And people using good judgment in the settings—a sheriff's deputy using good judgment in Washington State helped us detect a cell which—an alleged cell in Portland.

So that's really what we're talking about. You see people who are working with precursors or that might be the potential for bomb making, and frankly, there have been cases where you always get some reports that are—that lead you to things that were innocent but looked guilty. But we don't prosecute those. We don't charge

those. And that's one of the costs of doing business. We remember the story of a woman who overheard some people who may have been trying to pull a joke on her talking about making a bomb or conducting terrorist activities. Frankly, we think people should report that. The stakes of not reporting it are too high.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman. I recently heard a speaker who is nationally recognized as a highly regarded writer, and in his speech he said it is miraculous that we have not been attacked subsequent to 9/11. He furthermore said one of the persons to be credited for that is John Ashcroft. Now I know you have been beneficiary of criticism, Mr. Attorney General, so I have just laced that criticism with a glowing compliment.

When the Department of Justice issues or uses a court issued search warrant, it must provide notice to the person whose property will be searched. Now, several Federal circuits have allowed the Department to delay notice for obvious reasons. Now, am I not correct, Mr. Attorney General, in saying this was available; that is, these delayed notices were available prior to the enactment of the PATRIOT Act, were they not?

Attorney General ASHCROFT. That's exactly right.

Mr. COBLE. And I am sure the Department used that with some degree of frequency.

Attorney General ASHCROFT. Some degree, but only when necessary.

Mr. COBLE. Mr. Attorney General, some have suggested that section 213, which provides the statutory authority for these delayed notice searches, some have suggested that 213 should allow for delayed searches for terrorism-related investigations only. Now, prior to the PATRIOT Act, did the Department of Justice use these searches for nonterrorism-related investigations, A? B, if so, would limiting section 213 to terrorism-related investigations actually roll back the pre-PATRIOT Act law? C, as to the delays that lasted for unspecified durations, have any of these indictments been unsealed, and were any delays extended beyond 90 days? And finally, Mr. Attorney General, if the Congress decided to provide a specific time period replacing the undefined, "reasonable period," what would you suggest as a reasonable time period?

I'm sorry to bombard you with a four-pronged question but I think you took them all down.

Attorney General ASHCROFT. I'm hoping I did. I think the first question is did this—was this used in conventional law enforcement?

Mr. COBLE. Yeah.

Attorney General ASHCROFT. Prior to our focus on terrorism, that has really been elevated in the post-9/11 era, I think it's safe to say that it was used and used successfully and a variety of sort of various case law developed on it. It was supported in a number of the circuit courts around the country. And what the PATRIOT Act did was to make this uniform and to codify what various courts had done on an individual basis in the various circuits. And by and large, I think it's safe to say that the codification was the rule that had been announced in the Second Circuit, *United States* vs.

Villegas, which said that the U.S. Government must show good reason for delayed notice of warrants. Let me just give you some idea of what the good reason can be under the law. If immediate notification may result in death or physical harm to an individual, they said that you can delay the notice. Or if it might result in flight from prosecution, the person escaping, or that it might result in evidence tampering, or in witness intimidation. These are the things. Now, mind you, this is a court supervised process where you go to court and you say to the Court, we want to be able to make the search, but we don't want to reveal right away the fact that the search has been made. Can we delay giving notice of the search being made? Now, we have requested delayed notice of search 47 times under this provision, and the Court has granted every one of the requests. In addition to delayed notice of search, we can give delayed notice of seizure; in other words, evidence can be taken but not notice given of that evidence taken till the Court has said it should be given. We have asked for that 15 times. In 14 cases the Court said, yes, you can do that. In the 15th case the Court said why don't you just take a picture of it and leave it? And that'll be good enough. And obviously, that's what we did. The most common period of delays has been 7 days. The courts have authorized delays as short as 1 day because we don't want to ask for any more delay than we believe is necessary, and there has been a delay as long as 90 days. The Department sometimes has to seek an extension in the period of delayed notice, and we've made a number of those requests.

No court has ever rejected a request for an extension by the Justice Department, but we think that's a testimony to the fact that we are reasonable in that. For us to begin to limit the ability to use this law enforcement tool I think would expose the American people to jeopardy because we would have less capacity to enforce the law and keep people safe. That's a rather simple thing, but it's the truth. So what the PATRIOT Act did was to make the law a national law, which had previously been sort of varying in different areas. And I think that's—if we're going to have Federal law, it seems to me that it ought to be the same everywhere. You know, we don't want a Federal civil rights law that says one thing in one part of the country and a Federal civil rights law that says something in another part of the country. We don't allow that because the Federal law is the Federal law. So when the PATRIOT Act simply said this is the set of rules and we're going to embrace this formulation of the Second Circuit, which it seemed to me that the Congress is doing, obviously makes our job easier. We don't have to figure out which laws are we going to follow in this part of the country as opposed to this part, which rules; it's uniform for all Americans, equal justice on that ground. And frankly, the Congress did a good job here. To roll it back would be to expose the American people.

Now, you asked one other question on the time period. I really believe that you can look at what we've asked for. We've gone for as long as 1 day and sought extensions on 247 occasions, and the court supervises this. I think that's the kind of flexibility that we need. Obviously if we had to seek 247 extensions or 248 extensions—let me get my glasses on. I'm getting conservative again. I'm

ratcheting the numbers down—it means that we are not getting very big extensions. We're getting small ones and only taking what we need and then if we need another one we do. So the court stays involved. The judge looks at it over and over again to make sure there's not abuse here, and to make sure that you have these conditions, that this might result in death or physical harm, flight from prosecutions, evidence tampering or witness intimidation. When you get that kind of court supervision guaranteeing that these are the reasons, it seems to me that that's the approach that ought to be followed. So I'd leave it with the courts. The only alternative is to put a really long time on it in order to make sure you can do all of the cases, and I don't think it is a good idea to have a long time without court supervision.

Mr. COBLE. I agree. Thank you, Mr. Attorney General.

Mr. SMITH. [Presiding.] Thank you, Mr. Coble. The gentleman from Virginia, Mr. Scott, is recognized for his questions.

Mr. SCOTT. Thank you, Mr. Chairman, and thank you, Mr. Attorney General, for being with us today. Just following up that question, you spoke of delayed notice. I assume that you will eventually give some notice to someone who's been searched at some point, whether you use the evidence or not.

Attorney General ASHCROFT. Notice—I thank you for helping me clarify that, Congressman Scott. Notice will be given in every case. That notice——

Mr. SCOTT. That's fine. Are you familiar with the case in Tulia, Texas, where dozens of citizens, mostly African Americans, were rounded up, arrested, prosecuted and jailed as a result of police misconduct and fabricated evidence?

Attorney General ASHCROFT. I'm aware of the situation.

Mr. SCOTT. Okay. Are you aware that some are still in jail?

Attorney General ASHCROFT. I don't know what the exact circumstance is now. I'm aware the fact that the Justice Department is working on this matter actively.

Mr. SCOTT. The IG report on the 9/11 detainees, do you agree that that report suggests that crimes may have been committed by Government officials, including obstruction of justice, criminal assaults and intentional denial of civil rights and, if so, are you going to appoint a special prosecutor, or special counsel?

Attorney General ASHCROFT. We are aware of 18 cases that were alleged to be abuse cases. Fourteen of those cases have been reviewed by the career staff of the Civil Rights Division of the Justice Department, and those cases have been concluded as having insufficient grounds for criminal prosecution. The other four cases remain open and are the subject of continuing investigation.

Mr. SCOTT. Are you aware that the Inspector General's report itself says the Civil Rights Division and the FBI conducted no interviews of the injured detainees?

Attorney General ASHCROFT. I am aware that the Justice Department Civil Rights Division career staff is in the process of—has made decisions about 14 of the 18 cases regarding the sufficiency of the evidence. To comment further is not appropriate.

Mr. SCOTT. Well, can you comment on whether or not a special counsel will be appointed?

Attorney General ASHCROFT. I have no plan at this time to employ a special counsel in this matter.

Mr. SCOTT. Following up the questions from the gentleman from New York, you—I think you've acknowledged that there are people who were arrested in the United States and being held without charges and without being able to talk to a lawyer.

Attorney General ASHCROFT. Would you please repeat that question?

Mr. SCOTT. Are there people who were arrested in the United States who are now being held without being able to talk to a lawyer?

Attorney General ASHCROFT. People are being detained as enemy combatants, who are being detained and they are not being—and are not given access to lawyers.

Mr. SCOTT. Now, let me see how this works. Once they are designated as an enemy combatant and you have some factual basis to support that determination, how would someone who is factually innocent of the crime or of the charge, had nothing to do with it, false identification or bogus evidence, how would they ever get out of jail?

Attorney General ASHCROFT. Individuals who are detained as enemy combatants are detained by—under the Article II powers of the President to defend the country, they are not detained in the criminal justice system and they are detained pending the termination—during the pendency of the conflict. The habeas corpus action which——

Mr. SCOTT. I'm running out of time. I think I understand your answer to be that they have to wait till the end of the conflict and then they might get out at that time even though they were factually innocent.

On the Levy standards were significant changes from the present law significantly made to the present law?

Attorney General ASHCROFT. Would you say it again? I'm sorry.

Mr. SCOTT. On the Levy standards were significant changes made on what had been the law on investigations?

Attorney General ASHCROFT. If you're talking about the guidelines in the Justice Department, I think we've gone over a number of those today. There were changes made in those guidelines. I made those changes.

Mr. SCOTT. Were they significant?

Attorney General ASHCROFT. I think they are significant. They change the ability of our investigative activity to be preventional if it's appropriate rather than just prosecutional. We need to be proactive and not just reactive when the stakes are as high as they are in terrorism.

Mr. SCOTT. Now, Mr. Chairman, I cut him off on the question of whether or not an innocent person being held as an enemy combatant could be held, has to be held to the end of the conflict. And it was my understanding, and he might want to clarify this. My understanding is——

Mr. SMITH. The gentleman's time has expired. Mr. Attorney General, would you like to respond to the question?

Mr. SCOTT. If you are innocently charged you've just got to wait until the end of the conflict before you offer your evidence?

Attorney General ASHCROFT. I think the Fourth Circuit has indicated that the test in habeas corpus actions is whether or not there is a reasonable basis or—is that correct? Whether or not there is evidence to support the President's opinion.

Mr. SCOTT. So if he is actually innocent——

Mr. SMITH. The gentleman's time has expired. Thank you, Mr. Attorney General. I'll recognize myself for questions. First of all, let me thank you for your compelling testimony today and also for being willing to testify for up to 5 hours before our Committee today.

My first question goes to the Computer Crime and Intellectual Property Section of the Department of Justice that you referred to earlier in your testimony today. In response to another question, you covered the subject of peer to peer piracy in regard to movies and in regard to music. I'd like to go beyond that to ask you what the Department is doing to combat intellectual property theft as regards to copyright violations, patent violations, trade violations.

Attorney General ASHCROFT. I have that here somewhere. This is a matter of concern that is not only obviously a big problem here, but a big problem internationally. The Internet makes it possible for the theft of items to be achieved from remote locations. For example, six individuals in the United Kingdom have been formally charged and are awaiting trial early next year as a result of a global investigation, and we anticipate additional prosecutions will grow out of those. It is an example of our commitment to enforcing criminal intellectual property statutes.

The point is that you are helping us develop these capacities. We have 13 of these computer hacking and intellectual property units across the Nation. They are working together with the Criminal Division's Computer Crime and Intellectual Property Section here in Washington, DC. They receive specialized training. This is an area where we are beginning a process which will obviously need to grow because this is an area where the United States is creating value, and when the property is stolen and made available around the world, it steals from the wealth and resources of the United States.

We have, for instance, Operation Buccaneer, an ongoing investigation run by the Computer Crime and Intellectual Property Section. And the—let's call it the CCIP units in the Eastern District of Virginia. We work together with the Customs Service there. We have to date 22 individuals domestically convicted—pardon me, charged, pardon me, for conspiracy to violate copyright laws. The core conspirators who were convicted received the longest sentences that have ever been issued in this kind of case, and those were sentences of 3 to 4 years.

Now, I just have to indicate that this is a new world. The computer world and the ability to steal property and then to distribute it, if you stole a book and tried to reprint it, and then sell it, in the old world you could have the book seized and it would take a while to get it reprinted and it would take a—you'd have to have a distribution network. Things that are stolen and then sold over the Internet can be not only hidden very well so that they're hard to seize, but there is a ready made distribution network and that means that the things—it's an entirely different approach. I think

we have to think carefully about the kind of penalties here. The kinds of economic damages are incredible. And yet these 33 to 46-month sentences have been——

Mr. SMITH. I think we also ought to point out that the trend in physical crimes is going down. The intellectual property type of crimes are escalating even exponentially, and I know you're working to address that.

Let me go to my second question now, and this goes to the PATRIOT Act. Not many people realize today that 20 percent of all Federal prisoners in America are here illegally. They're illegal immigrants. Are there any changes that we need to make in the PATRIOT Act to better enable us to prevent these individuals from coming into the country illegally and endangering the lives and property of Americans?

Attorney General ASHCROFT. Well, Congressman, you live in a border State and you know the challenges that face a society that is attractive and open and free as the United States is and people who want to come here. And it used to be one of my main problems to try and figure out how we help secure our borders. But I think it would be best for me not to try and comment. I would commend the Congress for having increased our ability to defend our borders substantially. We have the NSEERS, National Security Entry Exit Registration System, which went into effect and that's helping. It's not only helping secure the borders, but thousands of people who have committed crimes who have tried to come back into the country have been apprehended, so it's helping us with law enforcement. The new SEVIS system, which is the student—way of tracking students, was established and stood up before the INS immigrated to Homeland Security. And that's helping us keep track of students to make sure that they stay on task and they're here doing what they said they were here doing.

But I need to defer to those officials now in the Department of Homeland Security.

Mr. SMITH. Thank you, Mr. Attorney General. The gentleman from Massachusetts, Mr. Meehan, is recognized for his questions.

Mr. MEEHAN. Thank you, Mr. Chairman. And thank you, Attorney General Ashcroft, for appearing before the Committee. In your opening statement you talked about September 11 and some of the individuals who lost their lives. It resonated with me because a day doesn't go by that I don't think of the 30 people from my district in Massachusetts that were lost. Captain John Ogonowski, the pilot of American Airlines flight 11, lived about 10 minutes from my home and left his wife Peggy and two beautiful daughters. On the morning of September 11, I was talking to Martin Fleming, a friend of mine I had grown up with, who is an economist, who watched the second plane hit, United flight 175, and he called me an hour later to tell me his brother-in-law was on that flight, Patrick Quigley. His sister was 8 months pregnant, their daughter Leah was born a month after September 11. She will never get to meet her father or know her father. And I think of Alexander Filipov, who was 70 years old, from Concord, Massachusetts, on United Flight 175, and his wife Loretta, and their three children. And Loretta Filipov was at my house the last time I saw her and she looked me in the eye and she said you know, Marty, there isn't

a day that doesn't go by that I don't think of my husband and miss him, nor do my children. And she said, "But you're my Congressman and you have a responsibility to balance the loss of these innocent victims with making sure we maintain the freedoms and the values that makes this country great." And she said, "I'm going to rely on you to balance that in your role." And I believe strongly in the notion of tracking down the al Qaeda terrorist network.

I think it's unfortunate that we're going to be coming along to the 2-year anniversary and we haven't tracked down the mastermind of this, Osama Bin Laden. But it also is important and what we're trying to do in this Committee is make sure that we have sunsetted pieces of the PATRIOT Act to make sure we could determine whether or not there were abuses because there have been abuses in the past. My colleague from Massachusetts, Mr. Delahunt, mentioned the FBI abuses in the Boston case, the Bulgiaflemi case. Martin Luther King's telephones were bugged by the Justice Department not in an effort to track down a crime, but probably in an effort to embarrass him. So we want to try to balance this. And there was an article written recently, not in the Washington Post, not even in the Hartford Courant, but that left wing publication known as the Wall Street Journal on May 22 carried a story on massive increases in data collection and text mining by the FBI and local police. And the article reported the FBI violent gang and terrorist organization file had been expanding rapidly since 2002. This database now includes all subjects of FBI domestic terrorist investigations, including such groups as anarchists, black extremists, animal rights extremists.

In Denver police used a similar database to collect personal details on members of political groups such as the American Friends Service Committee, a Quaker peace advocacy group and a pro gun lobby. Now the Denver police have since purged it and purged off people not suspected of crimes. But last summer, when a man listed in the Denver files had—as a gun rights group member got into a fender-bender a police officer checking against your FBI database found him described as a, "member of a terrorist organization."

Can you tell me how what appears to be a political organization which has never been charged with an act of violence ended up being classified as a terrorist organization? And has the FBI retained the Denver police man's reported stop as a terrorist contact?

Mr. SMITH. Mr. Attorney General, let me interrupt you and say to the Members of the Committee that a vote has been called and the Committee is going to continue while we await Chairman Sensenbrenner's vote and then he will return immediately, and we'll be able to continue while Members go vote. And Mr. Attorney General, if you don't mind we are not going to take a break. We are going to continue.

If you could respond to the question.

Ms. JACKSON LEE. Excuse me, Mr. Chairman. If you are away voting when your turn comes——

Mr. SMITH. I should have said that and reassured everybody that they will not lose their turn as we have it in the order that they will be asking questions. So no one will be disadvantaged. Mr. Attorney, if you will continue.

Attorney General ASHCROFT. Congressman Meehan, let me just say to you I appreciate the concerns you've expressed. I do not know the answer about the Denver situation. I was not aware of the Denver police situation. I'll be happy to look into that. I'll be happy to respond to your question, but I can't.

Mr. MEEHAN. Mr. Chairman, I lost a minute on that exchange.

Mr. SMITH. We'll be glad to redeem you 1 minute.

Mr. MEEHAN. If I could just follow up. Let's talk about limits on data collection then more generally. The FBI has relied on commercial databases to obtain information about existing suspects. But to what extent has the FBI been looking for patterns of terrorist activity in data that includes information about people who are not already suspects? And do we need some privacy rules to limit Government data mining in search of such patterns? And I'm just interested in what happens if the FBI relies on faulty data, either from the commercial sector or its own databases. Do Americans have any way to correct the inaccurate data that the FBI may have been relying on; in other words, whether it's commercially obtained or whether it's obtained through the FBI's own data collection?

Attorney General ASHCROFT. Well, your concern is an understandable concern, and I think we all are concerned about two things at least, probably many more. Faulty data is always a problem. You know, in the computer world we say garbage in, garbage out. So if you get bad input you're going to have a bad outcome. So we need to worry about the integrity of our data. And there is some concern about the scale of the data or there's too much data. And that's one of the reasons that I don't really believe that the FBI should be maintaining data. It's one thing to have—to go seek data if it's available someplace when you need it. It's another thing to accumulate data. And one of the things that I think protects privacy well is the idea of minimization; that you don't take more information than you need. And if you need to go get it, being able to go get it is very important.

Now, let me just, as an answer in some way to answer your question, someone else raised during the course of one of these sort of questions that had a lot more than I could probably respond to in it, something about Total Information Awareness, which has been relabeled Terrorist Information Awareness. And it was the responsibility of the Justice Department to comment on data and to say two things in regard to that. We had a responsibility as a result of the Wyden, I believe, amendment, that said that we had to submit a report. We had to list the laws that might be affected by certain activities by the Department of Defense. And then secondly, what principles we thought ought to exist in any system as a bare minimum to try and protect the—and let me just read those that were included in a letter which we sent on May the 20th that was submitted in the joint report that was submitted by the Attorney General and the Secretary of Defense.

Number one, the efficacy and accuracy of search tools must be carefully demonstrated and tested, and that should be an ongoing thing. Secondly, it's critical that there be built-in operational safeguards to reduce the opportunities for abuse so that when you construct a system you ought to have checks over sites in the system and safeguards.

Number three, it's essential to ensure that substantial security measures are placed to prevent such tools from unauthorized access by hackers or by outsiders. Number four, any agency contemplating deploying certain tools for use in particular context with respect to data sources that contain information on U.S. persons must be required first to conduct a thorough predeployment legal review. In other words, review in advance what kinds of things are being sought.

And the last principle that we suggested in that report was that any such agency must also have in place policies establishing effective oversight of the actual use and operation of the system before it's deployed. Obviously, when information is kept in and stored electronically, it can be accessed much more easily. And the key, I think you raise an issue about, well, what happens if you access information that's been—should have been withdrawn or that the integrity of which is a suspect. And these are the kinds of safeguards that we think need to be in place.

Generally, this was in response to a report that we were required to issue to the Congress both from the Secretary of Defense and the Attorney General. But I think these are pretty good guidelines.

Mr. SMITH. Okay. Thank you, Mr. Meehan. The gentlewoman from Wisconsin, Ms. Baldwin, is recognized for her questions.

Ms. BALDWIN. Thank you, Mr. Chairman. And thank you for being here today, General Ashcroft. I have been listening to some of the earlier discussion and questioning surrounding library records and other business records and several other assertions that there are many misunderstandings that may abound at this point. And so I wanted to try to focus in on this and clear some of that up. Prior to the enactment of the USA PATRIOT Act, a FISA order for business records related only to common carriers, accommodations, storage facilities and vehicle rentals; is that correct?

Attorney General ASHCROFT. Yes, it is.

Ms. BALDWIN. And what was the evidentiary standard for obtaining that court order?

Attorney General ASHCROFT. I don't think the evidentiary standard has changed. I think you have to allege—okay, maybe it has. It used to be to have a reason to believe that the target is an agent of a foreign power.

Ms. BALDWIN. Right. It was relevance and specific and articulable facts giving reason to believe that a person to whom the records related was an agent of a foreign power. Is that more—is that your understanding?

Attorney General ASHCROFT. I think that sounds good to me.

Ms. BALDWIN. And as evidentiary standards go, that's a pretty low standard. Or maybe I should say it's one of the lower thresholds that's possible, correct?

Attorney General ASHCROFT. Well, I don't know that we should get into—I mean, grand juries can subpoena evidence in criminal matters when certainly it's not—they don't have high standards. I mean this is——

Ms. BALDWIN. It's lower than reasonable suspicion or probable cause, is it not?

Attorney General ASHCROFT. I think it may be said to be lower than probable cause.

Ms. BALDWIN. Okay. Now, under section 215 of the USA PATRIOT Act now the Government can obtain any relevant tangible items; is that correct?

Attorney General ASHCROFT. I think they are authorized to ask for relevant tangible items.

Ms. BALDWIN. And so that would include things like book purchase records?

Attorney General ASHCROFT. I think it's possible that they—in the narrow arena in which they are authorized to ask, yes.

Ms. BALDWIN. Library book or computer records?

Attorney General ASHCROFT. I think it could include library book or computer records.

Ms. BALDWIN. Medical records?

Attorney General ASHCROFT. I don't know. I'm trying to get counsel from the people who are expert in this area. They—I think some of them are nodding and some of them are nodding the other direction.

Ms. BALDWIN. You can always clarify after the fact if you want. Educational records?

Chairman SENSENBRENNER. [Presiding.] If you wish to send a written response in for the record——

Attorney General ASHCROFT. Sure. But I think she's entitled to do this to me even if I don't have clarity in my answers now. But I would be glad to be more—clarify things.

Ms. BALDWIN. Okay. Education records?

Attorney General ASHCROFT. I think there are some education records that would be susceptible to demand under the court supervision of FISA, yes.

Ms. BALDWIN. Genetic information?

Attorney General ASHCROFT. I don't know about that.

Ms. BALDWIN. You can clarify after the fact.

Attorney General ASHCROFT. It might be that DNA in the possession of someone, say a person who had committed a crime had taken a drink of a glass of water, left a little DNA on the glass, we might be able to get that. I think we probably could.

Ms. BALDWIN. Under the PATRIOT Act what is the evidentiary standard for the FISA court order to obtain these sort of records?

Attorney General ASHCROFT. Okay. Let me find where I am here and see if I can get to the specific standard. Okay. I'm trying to read down to the place where it would be more responsive to your question. Okay. The records are available in any, "investigation to obtain foreign intelligence information not concerning a United States person or they are available to protect against international terrorism or clandestine intelligence activity." So these records are only available to obtain foreign intelligence information, not concerning a United States person.

Ms. BALDWIN. The standard, evidentiary standard——

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Mr. Attorney General.

Attorney General ASHCROFT. Well, first of all, I want to be as forthcoming as I can with this answer, so—and if this is not a sat-

isfactory answer we'll be glad to work with you. Records are available in any investigation to obtain—so if the records are to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, those are the things that the judge has to conclude are the purposes. And, when the judge concludes that those purposes are—if the judge finds that the investigation is for these purposes, he orders the FISA. That's the best answer I can give you now, and if you'll allow me to clarify that in writing later I will be happy to do that.

Chairman SENSENBRENNER. Without objection, the response will be inserted into the record. Mr. Attorney General, I think it's about time that you need a break. You've been in the dock for 3 hours. So the Committee will be recessed for 20 minutes. Is that fine?

Attorney General ASHCROFT. I'm a fast eater——

Chairman SENSENBRENNER. 15 minutes?

Attorney General ASHCROFT. No, I'm talking about 30 minutes, sir.

Chairman SENSENBRENNER. 30 minutes. Okay. The Committee is recessed until 12:30.

[Recess.]

Chairman SENSENBRENNER. The Committee will be in order. The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman, and thank you, Mr. Attorney General, for being here this morning and this afternoon, and I want to thank you for the job and the service that you've been doing for our country and that you'll continue to do. I also want to thank you and your Department for your willingness to work with my city, with the City of Cincinnati and the Police Department recently, especially to iron out the issues that arose from the police patterns and practices agreement. As you know, we have had some difficult times in the city in the last couple of years. And whereas we absolutely have to protect the civil rights of every person in our community, at the same time we do not want to handcuff the Police Department and make it tougher for them to do their job. And they, after all, are the folks that are principally responsible for protecting the law abiding citizens in our community. And I want to especially thank Ralph Boyd, the head of your Civil Rights Division, for his leadership on this important matter, especially recently, when he went out of his way to work with our police and with the leaders of Cincinnati to resolve an issue which had come up. And I'm hopeful that the City of Cincinnati and the Police Department and the Department of Justice can continue to cooperate and work together to heal our city.

And I don't know if you have any comment or not, but I did want to thank you very much for your work on that.

Attorney General ASHCROFT. Well, this is a matter of great concern to us. We think that the right relationship between police and citizens is very important. We take very seriously any abuses, obviously, and we think that the approach taken in Cincinnati should be a model. And for this reason we immediately went to work with all the parties in Cincinnati to achieve a settlement that we could work together to improve things. That's the way we ought to do things.

We had a little glitch in the system and we got everybody back together and worked it out again. And when we can work together to make—to respect the rights of American citizens and to make sure we have the right approach to law enforcement and the use of force, that is what we consider a win-win situation. So we are very pleased.

If you take off in an airplane from Cincinnati and come to Washington, somewhere along the way the wind will change and there has to be a little course correction. You have the right destination, but you have to make some course corrections to get here. I think the effort in Cincinnati needed a little fine-tuning, a little course correction. I am very glad that Ralph was able to go out and others cooperated. We made the course correction, and we are still going to the right destination. I am very pleased. And thank you for your cooperation, your help. It takes everyone in the community to work together for us to improve the circumstances, and thank you very much.

Mr. CHABOT. Thank you. Let me shift gears just for a second.

Last year the President, by Executive Order, created an Interagency Corporate Fraud Task Force that is led by the Deputy Attorney General, Larry Thompson. The Department has requested $16 million to fund the activities of this interagency effort. Can you bring us up to date on the efforts of the task force, and if you could elaborate on whether we can expect to see additional criminal prosecutions of both individuals and firms that may have engaged in corporate misconduct?

Attorney General ASHCROFT. Well, I think you have seen a large number of both corporations and individuals called to account because of their distortions of the financial condition of the corporation which inappropriately affected the values of the corporations in the marketplace. And we are working, because we believe that integrity is one of the main hallmarks of the American business system, and if we don't have the right integrity in the system, it will no longer be the industrial and production and creative jewel of the world. That is what American business is.

So we will not only seek to provide a basis for the public's confidence and that integrity with strict enforcement against individuals who corrupt that integrity, but in the event that the institution tries to cover up that integrity and doesn't cooperate to root out the corruption, you will see substantial institutional charges as well.

Over 150 charges have been brought, including very substantial corporate entities, 75 convictions to date. The matter goes forward and reflects the genius-level quality of the work by the Deputy Attorney General, Larry Thompson, who serves America in a way for which I am deeply grateful. Obviously, I am the Attorney General, so having everything that he does well is a great benefit to me, but also to the United States of America. America marches forward on the feet of its productive citizens and its enterprises, and the integrity of that system needs to be safeguarded and is being safeguarded.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman. Mr. Attorney General, I want to thank you for coming here to testify today and I want to thank you particularly for the effort you have put into the preparation and the demonstration of the command of all of these issues that you have delivered today. That is how I envisioned it as I studied civics as a young man.

Now I have a series of questions that may sound like a filibuster. However, I will try to run through them in a fashion to give you an opportunity to prioritize your answers. I just heard remarks with regard to, from Mr. Watt actually, disproportionality going into mosques, and that seems to me to be a suggestion that there should be some type of a quota as to which religious institutions should be observed. And then the follow-up question on that would be, the comment following that was that we need to find a balance between individual rights and group rights. So my question with regard to that comment is, under the United States Constitution and the laws of this Federal Government, what is a group right and does it exist?

And then I would point out that I am from Iowa. We have a methamphetamine problem in our State. That number, 85 percent, of those people who did not honor the deportation order also is coincidentally the percentage of methamphetamine that comes into my State across our southern border. And so I also happen to know that there may be 10 to 12 different stops of illegal aliens, and if they have not violated a felony, they are simply offered the opportunity to agree to return to their native land without adjudication. So if 85 percent of those who have been deported don't respond to that in an honorable way, I am wondering what percentage of those who are not adjudicated do not honor that directive. And then in the same context, what obligation do local law enforcement officers have to enforce U.S. immigration law and with our Federal law? So our sheriffs, our city police, what obligation do they have to enforce that? And if you can answer all of those, I have a series of others. But I appreciate your consideration to that strain.

Attorney General ASHCROFT. Thank you very much. I am grateful for your comments and your questions.

Our guidelines that relate to the places to which FBI agents may go does not reference in particular—it talks about places where the public can go, so it doesn't say mosques versus churches versus cathedrals or versus synagogues or versus other sorts of areas. And frankly, the FBI is authorized to go to public places in pursuit of preventing terrorism. So it is not where you go, but what your purpose is that really makes the difference.

So we have a neutrality in terms of mentioning those facilities because it is appropriate and because our purpose isn't related to those facilities, our purpose is the security of the people of the United States of America.

The second question you asked is about group rights and about the Constitution of the United States. We believe that the Constitution of the United States guarantees the rights of individuals. You don't have to be a member of a group in order to have your rights protected; that single individuals in the United States of America have the dignity and the respect that accords them the right to constitutional protection, the right to free speech, the right

to worship. They don't have to be a member of a church in order to have the right to worship. They can be a member of no church and have the right to worship on their own. So no person has a responsibility to join some group in order to have his rights or her rights protected, if I might indicate that as the base for the way rights are construed, I think, in the Constitution.

Now, it is possible to, I believe, have an individual's rights infringed because a group has been infringed, and we observe that in the history of our country, and we are sensitive to that and don't want that to be the case. If a law would say that—I happen to be a participant in the Assembly of God Church—no one can vote who is a member of the Assembly of God Church, that would be a law which is directed at a group that deprived me of a right. So I am sensitive to the fact that sometimes discrimination against a group infringes the right of an individual, so it is in that context that I understand these rights.

I used to represent the State of Missouri in the Senate and I happen to know that the methamphetamine problem is a very serious problem, and I know that it has been a problem which is transitional. There used to be a lot of mom and pop cooks of methamphetamine, home grown little operations, but that much of it now comes from sort of industrial laboratories, and much of it from outside the country. I am not prepared to validate or confirm the 85 percent figure, but I am certainly not prepared to dispute it. I just don't know about Iowa. I know that the security of our borders is very important and that as we have begun to dial up our concern about the integrity of our borders, we are increasing the number of drug seizures, including our effort in terms of methamphetamine. And we are working together with not only people to the south of the United States, but other neighbors to the north and in the world community regarding precursors, because methamphetamine is susceptible to manufacture in fundamentally simple processes, so that large shipments of precursor chemicals into the United States have our attention.

We have reinvigorated what is called the Organized Crime Drug Task Force, and we have focused on 50-some of the major drug organizations around the world. They are the people who build the industrial capacity to produce drugs in high volume, and while historically that was the purpose of OCDETF, the Organized Crime Drug Enforcement Task Force, we lost sight of going after those big producers, and we are focusing on them again and working together with the so-called Office of the Drug Czar or the President's Advisor of National Drug Control Policy.

The last question you asked, let me see if I can get it, local law enforcement. Local law enforcement has the responsibility to respond to its—to the counties, if it is a county law enforcement agency, or the State, depending on local rules. We have asked for their cooperation and asked for their enforcement on some issues. Some issues that relate to the Federal enforcement of laws. And when persons or certain kinds of violators are in the National Crime Information Center, including suspected terrorists and individuals who have been gross violators, I believe of immigration laws as well, then we ask for local officials to assist us. Many local officials have been kind to do that. I think it is fair to say that we

ask them to do that on a voluntary basis. They do it, and we are getting great cooperation from them, and I want to commend them for it. But we do not believe that the Justice Department is in a position to mandate that the local police enforce the Federal laws.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. Mr. Attorney General, it has been too long, but we welcome you back. All of us experienced the righteous indignation that you have so eloquently expressed in your testimony today post-9/11, during 9/11, and continuously as we support the war on terrorism. But my fear is that we may go to the point of changing the culture of America, the first amendment protections, the fourth amendment protections. So frankly, I believe we owe a debt of gratitude to Glenn Fine, the Inspector General of the United States Department of Justice, for several reasons. Let me quickly cite these and raise some questions of my concern.

Noted in his report was the fact that these detainees received no medical attention for injuries that they were entitled to. Spokespersons, including Assistant Attorney General Mike Chertoff, made a statement that every person detained has been charged with a violation of either immigration law or criminal law or has been detained as a material witness. There are suggestions that the FBI destroyed evidence. There are suggestions that indicate that the Civil Rights Division referred matters to the FBI for investigation, but the FBI never attempted to locate or interview detainees. There is a glaring suggestion that the fourth amendment was violated.

Clearly, the Supreme Court has said that you have to charge a detained person within 48 hours and holding someone longer than that without a charge presumptively violates the Constitution, and no court has ever said that it is okay for someone to be held for weeks or months without charge, and there is no distinction as to whether or not this is a citizen, illegal alien, or otherwise.

I would also say that Department officials were advised that holding detainees in this manner violated the fourth amendment. They were on notice. In your testimony you have made it a point to several times note that the Justice Department is using every constitutional means.

So, Mr. Attorney General, let me pose these questions framed around the fourth amendment. First of all, I would like you to give me a full report, and I know that you cannot do it at this point, on Patricia David and the whereabouts of her husband, Gerald David. Patricia David lives in Deer Park, Texas. Her husband was swooped up, a Pakistani, in March of 2002; whereabouts are unknown; deported. What was the basis of his deportation? No information given to the family, no information given as to his whereabouts. Misrepresentation given to Mr. David, who was on his job, about his detention, and he was in the process of accessing legalization.

Might I also refer you to a public forum dated June 4, 2003, Justice for All, that has a series of these incidences. I would also refer you to, just by my comments, to Dr. Luthafala out of Houston, Texas who has indicated over the course of these months that she

and her community have experienced enormous challenges and possibly abuses as it relates to the registration process.

I also would like to have a full report on the raiding of the family by the name of Kesbeh, K-E-S-B-E-H, in Houston, Texas in the spring of 2002, the necessity of raiding them, causing health conditions for the grandmother, son, and father.

I would like to ask now direct questions as my opening suggested. One, I would be interested in whether or not you would accept amendments to the library provisions that would require there to be evidence of individual suspicion that the records pertain to a foreign spy, terrorist, or other criminal. I want to know your assessment on the question of whether the FBI destroyed evidence with respect to determining whether or not there had been abuses. Your testimony says we outmaneuvered. Your testimony says that we outthought, but I hope we have not out-abused in our efforts to protect America. I believe these issues are extremely important.

Let me also bring to your attention a letter that I put in the hands of your staff regarding the misuse of Federal funds, but also the misuse, if you will, of Federal staff, and that is a civil rights complaint filed by State Representative Richard Raymond after the 53 or 55 Democrats moved out of the legislature, as they constitutionally were allowed to do, to prevent the voting on a certain issue regarding redistricting in the State of Texas. A complaint was filed. There is evidence that a letter was written before any review was given. There is evidence that this was——

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Without objection, the written response to the gentlewoman from Texas on the three specific cases will be included in the record, since I am sure you do not have that information, and, Mr. Attorney General, you can respond to the other points as you will.

Ms. JACKSON LEE. I thank the Chairman. I would like to ask unanimous consent to include this letter for the record.

Chairman SENSENBRENNER. Without objection, the letter will be included as well.

Mr. Attorney General.

[The information referred to follows in the Appendix]

Attorney General ASHCROFT. Well, I hardly know where to begin, but I am happy to respond. Let me just say that if you would be so kind as to provide me with this list, I think it may well be that I can address a number of these concerns that you have raised and I can address them to you in writing.

Ms. JACKSON LEE. I would be happy for that. There are two distinct other questions.

Attorney General ASHCROFT. You asked about the library measure.

Ms. JACKSON LEE. Yes.

Attorney General ASHCROFT. Frankly, I would be happy to confer and to work with Members of the Committee in regard to any improvements we can make in the way in which we protect the rights of the American people and the security of the American people, and I would be happy to have your suggestions and comments on that, as I would suggestions or comments from other Members of the Committee. I believe that justice is always a work in progress.

The terrorists are always adjusting their capacity, and we need to be adjusting ours and improving it, where possible. So with that in mind, I would welcome an opportunity to consult with you and confer with you about those items.

Ms. JACKSON LEE. There was another question regarding destruction of documents.

Chairman SENSENBRENNER. The gentlewoman's time has expired. Now, we have other Members that wish to ask questions.

Ms. JACKSON LEE. I understand. He didn't answer the question about destruction——

Chairman SENSENBRENNER. The gentlewoman will suspend. Everybody else has followed the rules. So can the gentlewoman.

Mr. Attorney General.

Attorney General ASHCROFT. Well, about an accusation that documents have been destroyed, if these relate to the use of FISA, and I am trying to recreate in my mind the question, I would refer the Committee to the submission of the Department in accordance with the PATRIOT Act on the report. I believe the report is accurate and I think it is informative. As a matter of fact, the Committee itself made an announcement about the library section, section 215, and I think it did so after looking at the report, and I would urge Members of the Committee to avail themselves of those items that we have submitted for purposes of your oversight and have submitted in accordance with an agreement with the Committee. I think they are instructive and valuable.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Forbes.

Mr. FORBES. Mr. Chairman, I would like to first thank you for holding this hearing. Mr. Attorney General, thank you for your patience and for being here.

The older I get, the more my wife and children point out to me that I am not perfect and have a lot of imperfections, and I know the longer you are in this office, you realize that you are not perfect and your Department is not perfect, but I just want to thank you, on behalf of my constituents and so many individuals that I see, for the work that you have done. The irony is, and I hope you convey that to the people in your Department, the irony is that the individuals who should be thanking you the most do not even realize it because they haven't become victims because of the work of the Department and what you have done.

We have also put a lot of pressure on you. We have asked you not just to prosecute criminals, but to prevent crimes. I have just three areas that I would throw out if you could address.

The first one is related to hard-core pornography on the Internet, and not child pornography, but hard-core pornography, and if at this point in time you could just give us perhaps a list of the most current cases that have been prosecuted relating to hard-core pornography. Many of us feel that that is an area that if we could do a little more prosecution there, it would have a huge, a huge impact.

The second thing is, you mentioned that every morning you are given a briefing by the CIA and members of your Department and you are told these are the things to be concerned about today. The briefings we get obviously are from our constituents as we travel

around, and they are concerned about a number of things. One of the big things are our immigration laws, enforcement policies, and not asking you to comment on the things that would be under Homeland Security, but I would be very interested in just your take from the Department's point of view of where you see our greatest vulnerabilities right now as they relate to terrorist activity and terrorist risk in the United States. And then the third thing, if you could comment on, is since September 11 what has the added stress that we have placed upon the Department done as far as your employees and the people working with the Department in terms of morale and the difficulty that you have faced since September 11.

Attorney General ASHCROFT. Well, first of all, if I am not mistaken you asked about hard-core pornography.

Mr. FORBES. On the Internet.

Attorney General ASHCROFT. Hard-core pornography on the Internet. Pornography needs to be seen, I guess, in two settings. One is there is a special category of child pornography, which is—has had an increasing challenge, and we have increased dramatically the number of cases in child pornography. And then there is an adult obscenity area of the law where there is pornography generally that is not related specifically to children which had basically fallen out of the prosecution category over the—in the latter years of the 1990's.

We have begun to train so that we can continue to escalate the prosecutions against child pornography. You know the real challenges we have faced. You participated in enacting the PROTECT Act just last month that will help us again, as it relates to child pornography. It relates to sentencing individuals who are convicted of it and departures and the like. We are training so that we can use the kind of skills necessary to confront this challenge on the Internet, because it is a different format and it is a different set of rules. As you well know, computer-generated images have a different standing before the court than others do, and all of those things are being taken into account.

Let me just say to you that we take the matters very seriously. We are training staff. I have held two nationwide training sessions for U.S. Attorneys, and they were well attended, in which I purposely devoted my own time and energy to indicate to them that this is a priority. We are prosecuting for the first time in a number of years adult obscenity as well as child pornography, and while we are being successful, I must say that there is a tremendous volume that we are not yet able to address. But we are in the process of moving forward.

Now, second, you asked what are some of our greatest vulnerabilities. I think in my opening statement I said that we have damaged al Qaeda, but we have not destroyed al Qaeda, and I think there is a sense of desperation in the terrorist community. And I think we also have a circumstance where there is an effort to sort of globalize terrorism, and I think we have to be very careful that we do everything we can to limit that. Our vulnerabilities are less than they were. We are infinitely stronger than we were. The things that you have done, the PATRIOT Act, the funding that has been given has made us stronger, the reorganization of the FBI

into an organization that seeks to prevent, not just to prosecute crimes that have been committed, is very important, and it has been very successful. But you are only as successful as the last day without something exploding or damaging or injuring Americans. And we know that a society as open and free as the United States is a society that is going to be susceptible. So we have to be alert all the time.

You added in a last question an idea about stress. You know, there are some people who want the ball at the end of the game because when the game is on the line they feel like they can help win the game. I think the people in the justice community are that way. I am talking about the community all the way from the guy with his feet on the street, the local policeman to the sheriffs and State officials, but in the Justice Department people have understood that this is an opportunity to defend this country for which we are all grateful, and this set of freedoms and rights that have made it possible for all of us to have the kinds of lives that we enjoy.

I think morale is strong, and I don't know that I would want to say that this has improved morale, but people understand the seriousness of this responsibility. I know that it is not uncommon for people to be on an extended basis putting in 10, 11, 12-hour days. I mean, I usually start work shortly after 7 and if I get home something a little after 7:00, that is not a bad day for me, and I know that there are people who are serving me every minute that I am in my responsibility. Morale can't be too bad if people are willing to do that. I thank the members of the Justice Department for putting themselves second and putting their country first over and over again.

Mr. FORBES. Thank you.

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Sánchez.

Ms. SÁNCHEZ. Thank you, Mr. Chairman.

Good afternoon, Attorney General Ashcroft, and thank you for appearing today to answer our questions. As you well know, there are numerous activities that fall within the jurisdiction of the Department of Justice and as a freshman it is a bit difficult to limit my questions to a mere 5-minute period. I just want to start by saying that while I support our efforts and your efforts to root out terrorism, I do have some concerns with the various provisions of the USA PATRIOT Act, and sometimes the way that those provisions have been implemented have led me to question the necessity of some of those provisions. Sadly, my concerns and questions only seem to have been validated by the report from the Office of the Inspector General.

His report calls into question detention conditions and practices, among other things. It also documents a number of areas where new authorities granted under the PATRIOT Act have never been used. In fact, it is clear from the OIG report that essentially all antiterrorism activity can be completed without any of the new authorities. Actually, your answers to our Committee's questions today show that many of those authorities have been used in investigations and prosecutions of crimes such as money laundering and fraud with no connection whatsoever to terrorism.

My concern with the DOJ activities extend beyond the PATRIOT Act as well and, as I mentioned before, I have a number of questions and I am going to ask them all up front. For any questions that you don't have time to answer today, I would appreciate it if you could please provide written responses later for the record.

First, I want to talk about an issue of great concern to me, and that is the cut in funding for the State Criminal Alien Assistance Program and the DOJ's reinterpreting the guidelines it uses in providing SCAAP reimbursements. In the past, States were able to receive reimbursements for costs of incarcerating undocumented immigrants regardless of whether the immigrant was eventually convicted. Now, however, the DOJ is planning to reimburse States only if the immigrant is actually convicted, and it is estimated that this represents an 18 percent reduction of eligible reimbursements for incarceration costs. It is my hope that the DOJ will correct the language so as not to penalize States who are trying to do their jobs.

So my question is, what role will you commit to taking with regard to changing that language?

The second question, or I would actually like to proceed by saying that I have a document from the National Immigration Forum that I would like to submit for the record with the Chairman's consent.

Chairman SENSENBRENNER. Without objection.

[The information referred to follows in the Appendix]

Ms. SÁNCHEZ. And this document includes 14 pages of quotes from police departments, sheriffs' offices, police associations and others, all expressing opposition to local law enforcement having to enforce immigration law. In addition, local law enforcement officers join with counterterrorism experts and Federal intelligence agents in emphasizing that identifying high-risk subjects that may pose a threat to national security begins with positive relationships between law enforcement and the community.

I understand that it is your position that State and local law enforcement officials have the "inherent authority" to enforce immigration laws, and I am interested in getting an explanation for what that position is based on. I understand some groups have requested this information via Freedom of Information Act requests but were denied, and I am curious to know at what point will you be providing that information.

Along those lines, I just wanted to draw your attention and ask if you were aware of an FBI investigation of Riverside, California police who recently overstepped their authority with regard to immigration control. They apparently thought they had the authority to enforce Federal civil immigration laws and, as a result, they stopped some avocado pickers in a grove and asked them for their driver's licenses, even though they weren't driving at the time. The local police then threatened to turn the workers over to the Border Patrol. They used racial profiling to target the group of Latino workers, which included legal permanent residents and citizens, and they assaulted one Mexican migrant.

While I am glad to know that the FBI is investigating the police department, I have to ask whether the FBI is also going to investigate why the local police thought they should be enforcing immi-

gration laws. It is particularly important to understand that, in light of the fact that the local police had not received any training in enforcing immigration law whatsoever.

Thirdly, I want to ask—well, I want to state that on November 28, 2001, Michael Chertoff, and I hope I am pronouncing that name correctly, the Assistant Attorney General for the Criminal Division, asserted in testimony to the Senate Judiciary Committee that, and I am quoting here, "Every one of the detainees has the right to counsel. Every person detained has the right to make phone calls to families and attorneys. Nobody is being held in"——

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Mr. Attorney General.

Attorney General ASHCROFT. Let me see if I can start down this list. Thank you.

First of all, you talked about the fact that a number of people were convicted of crimes that weren't terrorism crimes. In the interest of protecting the United States, we prosecute based on the crimes that we believe will result in convictions and will result in the immobilization of a person that is involved in terrorism. If we had the opportunity to prosecute a person who was involved in a terrorist act, who was also involved in a murder, we would prosecute the murder in all likelihood, because the penalties would be higher. I just want you to know that the kind of prosecution decision that is made is a decision that is made based on where we believe we can get the strongest ability to defend the United States and to detain and deter any additional criminal activity on the part of an individual.

I was Governor of the State of Missouri not too many years ago and one individual who was being surveilled happened to have been an individual who was surveilled on national security grounds. But literally while being surveilled, and I believe it was on a phone surveillance, he murdered his daughter. Frankly, we didn't feel like it was inappropriate to charge the person with murdering his daughter. As a matter of fact, that is the way in which the investigation went. It doesn't mean that the surveillance wasn't warranted or appropriate; it means that when we make judgments about prosecutions, we take a look at the entirety of the facts, we look at the national interest, and we assess what kinds of prosecution will best serve the national interest.

I just completed a case in Detroit. Two of the individuals that were involved in this scheme were found with the plans for an American air base in Turkey and with the kind of thing that led us to believe that they were conspiring to attack. Two of them were indeed charged with terrorism crimes. A third was eventually convicted on a crime related to fraudulent documents, which really may not be seen as a terrorism crime, but the creation of fraudulent documents to bring people into the United States who are not here for the right purpose, isn't here to commit terrorist acts, can end up being a terrorist crime.

So let me just try to say to you that in thinking about whether or not the PATRIOT Act and other crimes related to terrorism and other devices and tools related to terrorism are valuable, I think it is important to take a deep look to find out the entirety of the

circumstances. And sometimes the crimes charged may not be terrorism crimes, but I think it is very important that those individuals be held to account for criminal activity that is detected, and it may be in the national interest to pursue those other crimes.

You raised the idea of the SCAAP program. Let me first say that I understand how certain States with certain demographic characteristics and geography that relates to their position on the border have a large problem that is enhanced by the fact that we don't have the control of our borders that we would like to have. And I no longer have the authority to act in terms of immigration matters, but the funding for SCAAP is a matter of concern, and I will note that your complaint about the formula is one that says that you should be reimbursed for holding people who are not guilty. I do think we want to have an incentive for people to be apprehended and held, but I suppose if there were any individual for whom we didn't provide reimbursement it would be that we would probably be less likely to provide reimbursement for people who are not guilty of a crime, if you are going to hold them, than people who are guilty of a crime. But I will note your concerns about the SCAAP program.

On the Riverside investigation, I will acknowledge the fact that we are investigating that matter. And so to go beyond that and comment on the investigation would not be appropriate at this time. The facts that will be developed there will provide the basis for our making decisions about actions of the Justice Department and those decisions will be forthcoming when all of the facts have been assembled.

Thank you.

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Carter.

Mr. CARTER. Thank you, Mr. Chairman.

Attorney General Ashcroft, I want to thank you for being here today. It is an honor to have you here with us. General Ashcroft, as we discuss the Department's implementation of the USA PATRIOT Act, I agree with you that this act should use supervision as a very important part of this act. As a former State district judge, I would like to bring up a topic of increased case filings in our district courts across the country, our Federal district courts, and the availability of those Federal district court assets is important to us. As an example, the increasing population of Texas has resulted in an increased caseload for the Federal courts of jurisdiction within the State. When compared with other judicial districts around the Nation, the Southern District of Texas has more criminal cases filed than any other district in the United States, and more civil cases filed than 87 of the 93 districts. It also has more criminal cases pending than 92 districts and more civil cases pending than 82 of the districts in the United States. These high numbers are similar to the other three judicial districts in Texas as well, indicating that the Federal courts of Texas are overworked.

If new judicial districts were created, more Federal law enforcement resources would be made available to these areas which have high caseloads to deal with. This would include more prosecutors. It would also, as is the common practice, include more FBI assets, more DEA assets, which generally follow the judicial districts.

Given these facts, I would ask you to comment on whether increased caseloads in our Federal courts have affected the Department's ability to pursue the Federal prosecutions, and also your opinion on whether or not the creation of new judicial districts or new district courts would enhance the Department's ability to protect and enforce the law.

Attorney General ASHCROFT. Thank you very much, Congressman. It sounds like Texas does have the largest caseload and the biggest. In part of my response to Congresswoman Sánchez, I believe I indicated my awareness of the special circumstances along the border. Last year, this Committee, I believe, in conjunction with the rest of the Congress, provided additional judges, at least one of which I think went to the Southern District of Texas, but as I recall, maybe five went to San Diego, where they have had a caseload crunch. We have had an awareness of this problem that promotes overload, not only on the Federal judicial and law enforcement community, but on States as well, and we have provided in Justice Department funding additional resources to border local officials, including prosecutors. Our approach to this has not solved the problem. It has helped us sort of work with it. But we believe that an additional expansion in resources would be appropriate and support an additional expansion in those resources.

The stress on the system in those settings with the sheer numbers has caused a necessity for processing cases at a rate which in some respects devalues the cases. I would explain that by saying this: it is virtually impossible to try all of the cases in a timely manner. As a result, plea bargain arrangements have to be made. A system for doing that, called a fast track system, I believe, is in place in the district you represent and in some others that are similarly represented. Representative Flake also lives in a border area, so he knows some of these stresses and strains that relate to the SCAAP program which was mentioned and these law enforcement matters.

In order for these pleas—sometimes pleas to move the caseload—we have to ask ourselves, are we getting the right penalties imposed in these settings and if we are not, in fact, does this mean that justice isn't as well protected in those settings as it would be in other settings? That is a serious question.

I respect the fact that you know intimately what the judicial process is because you sat behind a different kind of bench than this, and we will be happy to work with you to try and identify the right balance of resources. We also know that if we just put money in prosecution, but not in adjudication, we can stack up the cases without having the adjudicative capacity if we have lots of courts, but not enough prosecutors. So we understand the need for the balance that exists in the system. And while we have addressed it, it is not yet at the place of optimum operations. And obviously, in that setting, our citizens would be willing to have improved justice, and we are going to do what we can to provide it.

Chairman SENSENBRENNER. The gentleman's time has expired.

Let me say that the Chair hopes later on this year that the Congress can approve a judicial personnel bill that is based on objective data, on caseload backlog and the like, rather than political

considerations. And the Chair is working on this at the present time.

The gentleman from New York, Mr. Weiner.

Mr. WEINER. Thank you, Mr. Chairman. Welcome, General. First, I want to extend my thanks and commendation to you and to Chairman Sensenbrenner for taking on the issue of untested DNA rape kits that are sitting on shelves around the country so seriously. Preliminary numbers show that in the neighborhood of nearly 400,000, and Mr. Sensenbrenner has publicly said that we are going to be addressing your proposals. I do believe, however, it is counterproductive to be cutting crime lab funding at the same time, but I do want to commend you for that.

I don't want to ask about that, though. I want to ask about a crime that will be committed 296,000 times between when that light goes from green to red. It is a crime, a Federal crime that has been committed about 14.4 million times since you sat down at that desk today. It is a crime that was committed last month 2.6 billion times.

Attorney General ASHCROFT. The suspense is killing me.

Mr. WEINER. At a certain point, you are going to have to hit your buzzer and guess what the crime is. It is a crime that frankly addresses something you said in answer to a question from my colleagues just about 20 minutes ago. You said, "America moves forward on the feet of the productivity of its citizens."

The crime I am referring to is the illegal theft of copyrighted material via the Internet. My question to you is of the 2.6 billion times this happened last month which impacts, as you know, an important sector of our economy. These are people who write songs that are not being paid, taxes that are not being paid, and companies that are, frankly, hemorrhaging money because of this crime.

Of the 2.6 billion instances last month, how many are currently under prosecution by your Department?

Attorney General ASHCROFT. Sir, I can't tell you. I just—I don't know. I don't have a record of all of the U.S. Attorneys.

Mr. WEINER. Any?

Attorney General ASHCROFT. I just am not able to give you—I know that we have sought to enforce intellectual property laws with a new approach. We have 13 different task forces that you have helped us generate. We have recently gotten 22 convictions in an operation here in the Eastern District of Virginia relating to the Internet copyright protections. But you are probably talking about the user-to-user transfer of these things and I am not prepared to give you data on that, because I don't know.

Mr. WEINER. Well, would you know if since in the last year whether there have been any prosecutions, even a single one?

Attorney General ASHCROFT. I don't. I don't have numbers that I can give you, sir. I will be happy to report to you on that. As you know, this is the—the law has recently been evolving on this because the courts have ruled that certain of these activities are indeed criminal, and for some time, when Napster—was that the name of it?—Was in its heyday? It was an arguable fact that it wasn't a matter of illegality. We now have settled those issues. But I am not in a position to give you specific numerics or to make a report on that.

Mr. WEINER. Well, I would suggest that a crime that has been committed about 60,000 times since I asked my question is one that deserves to have greater attention, and I think that frankly what has happened is that there has been essentially a position adopted by the Justice Department of kind of laissez faire, to wait to see how it all shakes out.

Some things are undeniably illegal and violations of copyright law. At the moment we are seeing huge ramifications in the marketplace because of a sense that it is going to be left entirely to the private sector or possibly this Congress to act. In the meantime, even the most basic initiatives have not been taken. And if you would be so kind in response to this question as to provide me with the answer to my question, at the very least the notion of how many of the violations took place last year are even under investigation.

I would like to ask another question. In recent times you have taken different positions on the COPS program, this is the Community Officer Program, which allows local law enforcement to have some of their police officers paid for with Federal dollars. You said when you were a Senator that you thought it was an excellent program. During your confirmation hearings, you expressed support for it. And when you appeared before this Committee after the President's first budget that proposed zeroing it out, you took a decidedly frankly more ambivalent position about it.

What is your position today on the COPS program? Has it been successful in reducing crimes in neighborhoods around the country?

Attorney General ASHCROFT. Well, first of all, let me just say that I think the COPS program has been successful. The purpose of the COPS program was to demonstrate to local police departments that if you put additional people, feet on the street, that crime could be affected, and that people would be safer and more secure. We believe that the COPS program demonstrated that conclusively. And as was apparent from the studies that showed that local communities, after the Federal Government ceased funding, those law enforcement officials very frequently, in about 80 percent of the cases, the community continued the funding, because they realized the value. That was the reason for the COPS program. We believe it was very successful, and that it has been—its success has been noted by local communities that have understood the value of additional law enforcement tools and resources.

Chairman SENSENBRENNER. The gentleman from Arizona, Mr. Flake.

Mr. FLAKE. Thank you, Mr. Chairman.

Mr. Attorney General, I just want to say how much we all appreciate the difficult balancing act you have in this regard, particularly with the PATRIOT Act. Let me ask a question on delayed notification, the so-called sneak and peak. As you mentioned, it had been used prior to the PATRIOT Act in some fashion, but this codified it and obviously has led to more wide use.

Since the PATRIOT Act, has it been used, or what percentage of the time is it used for conventional illegal activity as opposed to terrorism?

Attorney General ASHCROFT. Well, I am not prepared to be able to say how many times it is used for other activities. I think the

data which I gave—the Department has requested a delayed notice of search 47 times, but I think that is in response to section 213. But since—let me just amend that. Since this is not FISA related, this is just the way in which the law has been made uniform nationally, it must be about 50 times that we have actually asked for the authority to make a search without notifying the party of the search—and not without notifying, but delaying notification. All people eventually are notified.

Mr. FLAKE. So it is almost exclusively for terrorism?

Attorney General ASHCROFT. I suspect that it has been used a number of times for terrorism. I don't have the numbers here, which were terrorist utilizations and which weren't.

Mr. FLAKE. A question with regard to the libraries. A lot of libraries have made a practice of destroying computer records and other records in defiance of the PATRIOT Act. They are saying that they don't agree with it, therefore, we will make it more difficult for the Justice Department to come in and actually search those records. To your knowledge, has any investigation been stymied? Has the Justice Department sought information that was then denied by any of the libraries?

Attorney General ASHCROFT. I don't know. What I can say is that we know of several cases where some—I may be venturing the wrong sort of file in my data bank, because I think it was as it related to the ability of an Internet service provider to alert us to problems he found in his community of users that were able to thwart a bombing at a school and an injury to several corporate executives. But I was going to give that as an answer to the library question, but I think I am in the wrong card catalog here, Congressman. We are just past 4½ hours, and I think the hard drive is clogging up.

Mr. FLAKE. That is a good answer. I was a freshman when this hearing started. I think I am a sophomore now.

With regard to the PATRIOT Act, it allowed for increased rewards for information leading to the arrest of a terrorist. To your knowledge, has that bump up in rewards been effective, and would it be more effective if it were bumped up further still?

Attorney General ASHCROFT. My own view is that there have been positive results and valuable contributions to the apprehension and detention, immobilization and incapacitation of terrorists as a result of the rewards system, mostly internationally. I am not aware of a situation where we have thought that a bigger reward offering would somehow have improved our performance. I think it has worked pretty well.

Mr. FLAKE. This morning I met with a university president from Arizona who noted that one of his students has actually been arrested recently for suspected terrorism. Apparently they approached the FBI, the university administration, and asked if they could help or if they could get some information and wondering if they might be able to provide needed information to the FBI and felt that they were given kind of the cold shoulder. What is the policy of the Justice Department in terms of cooperating with local, not just law enforcement officials, but other administrators who may have information that would be helpful?

Attorney General ASHCROFT. Our policy is to take the help where we can get it within the framework of the law and the Constitution, and if we are not doing that, we are not doing as good a job as we ought to be in helping protect the American people. If you don't mind helping me understand more completely the situation which you have described, I would like to make sure that we don't allow any failure to cooperate to prejudice the security of our people.

Mr. FLAKE. Thank you, and thank you for your good work.

Chairman SENSENBRENNER. Thank you. The gentleman from California, Mr. Schiff.

Mr. SCHIFF. I thank the Chairman, and I want to thank the Attorney General for his persistence here today. I know it has been a long afternoon and we very much appreciate it.

The PATRIOT Act made some important changes to how law enforcement can utilize the tools that it has to investigate and prosecute terrorism. Some of those changes were necessitated by changes in technology such as the advent of cell phones and disposable phones and phone cards, et cetera. But one of the results of that is that the potential for overboard use of these surveillance tools is much greater than it had been in the past. Now that you can tap a person rather than a facility and it can follow that person with whatever facility they use, there is a much broader potential sweep which I think makes it that much more important that Congress do its job very effectively in overseeing the use of these tools by the Justice Department.

At the last hearing of some of your staff, I raised the possibility of having a classified hearing so that we could not only have the opportunity we already have to review the classified information that Justice has provided, but ask questions and get timely responses, and I just would like to make a further request that we have the opportunity to do that.

The point I wanted to ask you about, Mr. Attorney General, was one raised earlier, but I think it is so important that it bears a second emphasis, and that is the detention of Americans and lawful residents as unlawful enemy combatants. I know that you cited earlier historic precedent that a President has the power to detain unlawful enemy combatants, which is true. But nonetheless, there is no precedent for a war of the nature that we are in, of a war that is of potentially unlimited duration against not exactly a nation, but rather a State terrorist organization present in many nations. And because of the unique nature of this war and its potentially unlimited duration, I think it raises really questions of first impression about how we handle unlawful enemy combatants. And for the Administration to take the position that it can unilaterally designate an American off the street of Chicago or New York or Los Angeles as an enemy combatant, detain them indefinitely, and never allow a court to review that detention is, I think, a very, very unprecedented step and one that concerns me greatly.

One of the things that concerns me about it is, I have not heard the Justice Department articulate how it will distinguish between someone it arrests and decides to treat as an unlawful enemy combatant who is an American, versus how they will decide when to treat that person as a criminal defendant. And I think the Justice

Department has to establish a standard, a public standard, one that Congress can review that will say, under these circumstances we will treat an American or unlawful resident as unlawful and a combatant, and under these circumstances we will treat them as a criminal defendant.

The concern that I have is that it cannot be the quantum of evidence against the accused that is the basis of that determination. And without review of the courts, there will be, I think, a strong institutional incentive within the Justice Department to make that determination based on the level of evidence; that is, if the evidence isn't sufficient to prove in a court beyond a reasonable doubt, then we will treat them as an unlawful enemy combatant, so the lesser quantum of evidence will mean that they are characterized in a way that you never get put to the proof in court.

Mr. SCHIFF. And, of course, that also means that we are potentially locking up people indefinitely without review where we have the least amount of evidence against them, and therein, I think, lies the problem.

So, if you could articulate, Mr. Attorney General, how it is that your Department currently distinguishes between unlawful enemy combatants and criminal defendants so that we can assess whether the proper criteria is being utilized. And also, as I would imagine in these cases, if you did go to court, you would easily make the showing to detain these people. Why not go to court? I was an assistant U.S. Attorney for 6 years. I wouldn't want the unbridled discretion to designate an American as an enemy and lock them up without judicial review. Why not go to court and have someone review the work of the Justice Department?

Chairman SENSENBRENNER. Mr. Attorney General.

Attorney General ASHCROFT. Let me just—first of all, I think your questions are thoughtful questions, and I respect them and I appreciate your experience. But let me disabuse you of one aspect of the idea that somehow the Justice Department can designate someone as an enemy combatant or some U.S. Attorney can. It can't be done. It is not what the Justice Department does. This is something done under the article—article II of the President's power to defend America. This is a determination made not by the Justice Department, not in the context of judicial activity and prosecution by—in the criminal justice system. So these are not Justice Department decisions. Ultimately, the decision to take a person as an enemy combatant is an executive decision.

I should point out that—as well, that when you say this is an unprecedented step, it has a nice ring about it, but the fact is that it has been done over and over again for years. But it is extremely rare here in this setting.

In the Quirin case at the end of the Second World War, there was an American taken from an American street designated as an enemy combatant, and eventually tried in a military tribunal. But this was a person who was a citizen of the United States, the subject of Supreme Court review. So, that this power, which has been part of the capacity and duty of every President of the United States to defend the United States, has been an executive power ab initio, from the very beginning of the country. And it is not un-

precedented, but it is extremely rare. Let me tell you how rare it is here.

There are two people being held as enemy combatants in the United States now, to my knowledge, and those people are pretty well known. And if the President is not in a position of not being able, if he were to find that he had made a mistake, of reversing his decision, he could do it very easily. So this is a setting where the President and the executive have a responsibility to make a decision, a decision which is very important to the security and safety of the United States of America.

But this business about U.S. Attorneys being tempted to say, well, we don't have much on this person, we will just label him an enemy combatant without—it is not within their authority or power. They can't do it. It is simply not there. We deal in article III prosecutions. The Attorney General doesn't have the authority—and its prosecutors—to make the determination that someone is an enemy combatant. And, frankly, I think your own feelings about that would be our feelings on that, and I don't think it should be the responsibility of U.S. Attorneys around the country to make those determinations as well.

And I was trying to think if there were other things—I don't want to not answer other questions that you asked, but that was the main one I think you had.

Mr. SCHIFF. I want to ask, Mr. Attorney General, also, why not seek court review.

Attorney General ASHCROFT. You know, I guess I would put this. The Quirin case established that there is a habeas corpus action that is available in those settings. And if there is a debate about that, it would come in what the courts require. The Fourth Circuit has recently said that if the court finds that there is a basis for the President's decision, I think that is—some evidence. If there is evidence for the President's decision, it will not seek to review that or to second-guess it. So that is the level at which there is judicial activity and involvement at this time.

I just want to make it clear that there are two individuals, I think only one of which was apprehended in the United States, that are U.S. citizens that are held as enemy combatants. And in the event that it was thought to be abusive or a mistake, I am sure the President has the power to correct it if he so—and I am quite confident that he would if he thought he would make a mistake.

Chairman SENSENBRENNER. The gentlewoman from Tennessee, Mrs. Blackburn.

Mrs. BLACKBURN. Thank you, Mr. Chairman.

And Mr. Ashcroft, thank you so much for your patience today. We all appreciate it. It has been lengthy, and we have all been in and out so I have not had the opportunity to hear everything that you have had to say today. But I do want to say I appreciate your attentiveness to the intellectual property issue. I represent a district that has a lot of songwriters, screen writers. TV production, individuals and professionals. And that is an issue that is of tremendous concern and also tremendous economic impact on our fair State and our area. But today, I would like to talk with you about—a little bit about the immigration issues, and address some of that, because that too has been of great concern in Tennessee.

Unfortunately, the State has a law through which illegal aliens can get drivers license. So, as we have read the Inspector General's report on the September 11 detainees, as we have read different things pertaining to immigration, it has been of concern to us. And I had heard that many of the detainees were individuals whose suspicious activities would present real cause for concern to the average American. And I just wondered if you could give us some examples.

Attorney General ASHCROFT. Well, all of the individuals who were detained had violated the immigration laws of the United States and were subject to deportation as a result of that violation. But there are some of the most, I think, dramatic examples. One was an illegal alien who was a roommate of one of the 19 hijackers and was also an acquaintance of a second hijacker. And here is a person illegally in the United States, had been rooming with one of the people who was responsible for the crashing of the airplane, one of the airplanes, and was involved with another of the hijackers.

Another one, for example, was a person in the United States illegally who admitted to the FBI that he had trained in terrorist camps in Afghanistan and who was linked to known members of a terrorist organization.

Those are the kinds of individuals that we were very reluctant to release.

Third might be an illegal alien who worked at a store where there were 25 photographs of the World Trade Center found and who was suspected of money laundering and was subsequently convicted of criminal immigration violations.

Another example, an illegal alien who left New York shortly before September 11, 2001, carrying a suspicious package containing a pilot's license and flight materials.

Obviously, some of these things are inadequate to prove criminal activity and responsibility, but together with the fact that these people were in the United States illegally, they led us to believe that we would not be well served nor would the people of America be well served were we to simply release these individuals.

I guess as I get older, I start repeating myself; but the Inspector General has, in some ways, repeated his attention to this issue, and in his previous visiting of this issue, he pointed out one of the other problems that we have, and that is, that when you let some of these people out on bond, or release them prior to their actual deportation, they don't stay. Or, they do stay. Pardon me. That depends on your point of view there. But of individuals that were from state sponsors of terrorism, 94 percent of them stay in America and find their way into the culture and don't leave when they are ordered to leave by the adjudicating authorities, and 87 percent of the population generally.

So we had the situation where we had very, very serious reservations about individuals. These were obviously some of the more dramatic reservations. But we felt like our duty was to protect the American people. It was legal to detain them to the extent that we did, and we did. And I think that we would obviously have no interest ever in detaining people who are innocent, and will do the best job we can of establishing their innocence at the earliest pos-

sible moment. But when we have the kind of context and chaos that followed 9/11, we believe that the policy was the right policy.

Now, I would add just one caveat to that; there are allegations that some people were abused. And that has never been the policy, it can't be our policy, and won't be our policy. And we will continue to investigate to the extent—whether there were abuses. And if there were, we will take administrative action and, if necessary, take criminal action if the factual basis is there to support that.

Chairman SENSENBRENNER. The Committee will be in order. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. I appreciate your patience in holding this hearing.

And Mr. Attorney General, your patience goes beyond all imagination. We appreciate that. We have several questions; I understand we are going to be able to submit questions for the record, we will do that. But I have two or three things that I would like to address to you.

First of all, are you aware of any data-mining efforts by any component within the Justice Department that collects the information on individuals other than criminal suspects?

Attorney General ASHCROFT. No, I am not. We—I think it is fair to say that I—we may be looking for, in various settings—and I am not sure the Justice Department would be doing this, but for—if you are looking for certain things that might characterize people who would be high risks for an immigration or for boarding airplanes and things like that. And I'm not talking about race as a marker, but other markers there may be some activity to do that. People who purchase their tickets in certain ways and do other kinds of things and have traveled to certain nations and things like that. Those are the kinds of things that we might be interested in knowing about a person.

Mr. CANNON. Do you have a program of that that is——

Attorney General ASHCROFT. No. I just think that one of the ways that you try to promote security is to, when you——

Mr. CANNON. Would that be something that would be happening, say, at the FBI or within Department of Justice?

Attorney General ASHCROFT. I don't think it is happening at the FBI or at the Department of Justice, no.

Mr. CANNON. If, after thought and consideration with your staff, you come up with some, I would appreciate knowing that perhaps in writing what may be happening there.

Attorney General ASHCROFT. Okay.

Mr. CANNON. During my Subcommittee's hearing on Reauthorization of Energy and Natural Resources Division and the Civil Division, Assistant Attorney General Sansonetti of the NRD and Mr. Schiffer, the Civil Division, provided substantial testimony regarding the Indian tribal trust cases, specifically *Cobell* v. *Norton*. The case was presided over by Judge Lamberth. The testimony that was presented was important to me and to the Subcommittee. Based on this testimony, I am convinced that Judge Lamberth and this case are having a detrimental effect on the ability of the Department of the Interior and the Department of Justice to properly execute their respective responsibilities.

Judge Lamberth recently made comments, noting that the Congress, and specifically the Appropriations Committee, were interfering in his ability to conduct a proper trial, stating: The court knows of no previous Congress that has ever intervened in a specific pending civil action to reduce the compensation rate for judicial officials. In addition, he indicated that: The actions the Appropriations Committee were seemingly engaged in concert with the Administration.

Could you please indicate where the Cobell case currently stands? This is a case where you have a judge who held three secretaries, one in the last Administration and two in this Administration, and many other officials in contempt. Both Mr. Sansonetti and Mr. Schiffer suggested that they are having a hard time hiring people because they are afraid that if they get working on this case they are going to ultimately be held in contempt.

Do you have a sense of where that case is now?

Attorney General ASHCROFT. Yes, I do. The case is currently being litigated. And it would be inappropriate for me to get deeply into the case. I appreciate your interest in the matter. The Justice Department has sought appellate relief in the face of what appears to be some rulings on the part of the district court that we hope our position will be vindicated on appeal.

There are really two ongoing matters currently in litigation. The first involves our appeal of a contempt finding, and the second is a trial on the merits. A ruling by the court of appeals is expected in the near future. In the meantime, the district court is proceeding with a trial on the merits of plans for accounting and the trust reform that Interior filed pursuant to a court order.

This is an area in which I need to be very careful about the way I speak. I normally speak only in areas where I might offend one branch of Government, but in this case, I might end up offending at least two, if not three branches of Government.

Mr. CANNON. Let me increase your discomfort possibly or maybe ease it by saying, is there anything that you see that we can do in Congress to help solve the problem in these Indian trust fund cases?

Attorney General ASHCROFT. I don't have a request to make of you, Congressman. I do appreciate your interest, but I don't have a request to make of you.

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. Attorney General, let me personally thank you on behalf of myself and all of the Members of the Committee for what has been for you, I am certain, a grueling 4½ hours as well as countless hours, if not days, of preparation time. I believe you have answered many of the questions of Committee Members very forthrightly and directly, and have given information that has really not been on the public record relative to a whole host of issues, not just relating to terrorism and the PATRIOT Act, but many other issues as well. And I think that this hearing has gone a long way to help defining what these issues are. I certainly would like to thank you again.

Now, I know that you feel like coming before us is like appearing before the inquisition. And I think that, given the wide ranging nature of the questions, all of which are legitimate—and I have added

it up, and 26 Members of the Committee did avail themselves of time to ask questions of you directly. I think this shows that the system is working, and I would like to express my appreciation to your staff whom I am certain have been spending countless hours of putting together the material on that real thick binder that is in front of you so that you can be properly prepared to answer the questions.

It is now time for you to go put your feet up. Thank you again, and the Committee is adjourned.

[Whereupon, at 1:57 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Speaker and Mr. Ranking Member, I thank you for convening perhaps the most important hearing the Judiciary Committee has held this year—a hearing on the oversight of the United States Department of Justice (DOJ).

Among the numerous responsibilities of DOJ is the implementation of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, hereinafter the PATRIOT Act. The PATRIOT Act was a response to the frightening terrorist attacks of September 11, 2001. The stated purpose of the PATRIOT Act is, "To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes." The PATRIOT Act significantly enhanced the law enforcement powers of the DOJ and its various bureaus in an effort to prevent terrorist attacks in the future. However, since the expansion of the DOJ's powers, there have been several troubling abuses of those powers in incidents unrelated to the war on terrorism. Many of the powers expanded under the PATRIOT Act were apparently unnecessary.

DETENTIONS

Two powers that were not needed in the war on terrorism are the expanded detention and deportation powers enacted in the PATRIOT Act. The PATRIOT Act expanded the grounds for deporting a person for political association deemed a threat to national security. The PATRIOT Act also provided the government with a new mandatory detention power for non-citizens. This expanded power permits the government to detain a non-resident without a formal charge for up to seven days (section 412).

The DOJ has been criticized for mistreating immigrants who were detained in the course of investigations of the events of September 11th. Several individuals who were described as terrorism suspects, although they were never certified under the PATRIOT Act as terrorism suspects, were detained. The Inspector General of the DOJ recently released a report that concludes that in the course of the arrests and detentions serious abuses occurred, and "indiscriminate and haphazard" tactics were utilized. These abusive tactics included lengthy detentions without formal charges, and denying the detainees the benefit of legal counsel. Additionally, immigrants were confined in excessively harsh conditions, and the detentions were excessively prolonged as a result of a "clearance" procedure that established what amounted to a presumption of guilt.

REVISION OF AG GUIDELINES

On May 14, 2002, DOJ issued new guidelines that regard the investigations of general crimes and domestic security cases. The new guidelines empower FBI agents to attend political meetings, religious meetings, or any other public event while concealing their identities. Furthermore, the FBI agents do not need any suspicion that criminal activity is involved to attend the event.

According to FBI admissions from a survey of 45 field offices, unidentified FBI agents have entered 10 mosques without any suspicion of criminal activity since September 11, 2001. Only one of the visits was conducted under the auspices of the new guidelines, and that visit uncovered no information useful to a terrorist investigation. The other nine visits were conducted under guidelines in place before the passage of the PATRIOT Act. Apparently, the PATRIOT Act has expanded the FBI's

investigative powers, but those powers are neither necessary, nor being used in the war on terrorism.

This abuse of powers under the PATRIOT Act is disturbing because it is a severe intrusion into personal privacy. If law enforcement agents are empowered to spy on the members of mosques under the PATRIOT Act, even when there is little evidence of terrorist activity, then all Americans' right to privacy may be lost. The primary concern of critics of the PATRIOT Act is the potential for use of the additional powers against citizens in investigations not related to terrorism. The misuse of resources in the Texas redistricting case is a perfect example.

MISUSE OF RESOURCES IN TEXAS

There were several allegation of misuse of DOJ powers during the redistricting controversy in Texas last month. On May 12, 2003, fifty-three Democratic members of the Texas legislature departed en masse from the Texas Capitol to protest an unfair Republican redistricting plan. During the protest, and in the days shortly thereafter, there were several allegations of the improper use of DOJ and FBI resources in the Texas redistricting case. There are also concerns that the DOJ is failing to investigate a potential obstruction of a Federal investigation, under section 1512(b) of title 18, United States Code.

Several news sources reported that Department of Homeland Security resources, as well as resources from other federal law enforcement agencies, were used to for political purposes in Texas. Specifically, DHS's surveillance resources were used to search for the protesting Democrats. Additionally, Tom DeLay (R-TX) inquired whether of Texas House Speaker Tom Craddick whether FBI agents and U.S. Marshals could be used to arrest the Democrats out of state.

I joined many of my colleagues from Texas in mailing a letter to our witness today, as well as Homeland Security Secretary Tom Ridge, and FBI Director Robert Mueller to express my objection to the use of federal law enforcement resources in connection with the Texas redistricting case. The DOJ's reply to our letter was insufficient. It claimed that the Department was not aware of any information pertinent to the Texas case that would warrant action by Federal law enforcement authorities and accordingly it had no plans to deploy law enforcement resources in connection with the matter.

The possible violation of a federal statute occurred on May 14, 2003. On that day the Texas Department of Public Safety ordered Texas Department of Public Safety captains to destroy all records and photos gathered in the search for Democratic state representatives. This is a violation of Federal statutes pertaining to obstruction of justice as DHS is proceeding to investigate how it got involved in the battle. The Department of Justice on the other hand has refused to conduct an investigation.

IMMIGRATION

On April 17, 2003, Attorney General John Ashcroft issued a precedential decision in *Matter of D-J-*, 23 I&N Dec. 572 (A.G. 2003). The respondent in that case was an 18-year-old Haitian refugee who was aboard a vessel on October 29, 2002, that had sailed into Biscayne Bay, FL, carrying 216 undocumented immigrants from Haiti and the Dominican Republic. He and other passengers of that vessel were taken into custody and detained by the Immigration and Naturalization Service (INS), while attempting to evade law enforcement authorities when the vessel reached the shore. The respondent was placed in removal proceedings in which he requested an opportunity to apply for asylum. An Immigration Judge granted a request from the respondent for release from custody during the course of the proceedings. The INS appealed that decision to the Board of Immigration Appeals (BIA). The BIA dismissed the INS's appeal and affirmed the decision of the Immigration Judge. In *Matter of D-J-*, the Attorney General overruled the decisions of the BIA and the Immigration Judge and sustained the INS appeal.

Attorney General Ashcroft concluded that releasing the respondent, or similarly situated undocumented seagoing migrants would give rise to adverse consequences for national security and sound immigration policy. According to Ashcroft, the release of such aliens into the United States would come to the attention of others in Haiti and encourage future surges in illegal migration by sea. Encouraging such unlawful mass migrations is inconsistent with sound immigration policy and important national security interests.

I also am concerned about Attorney General Ashcroft's reorganization of the Board of Immigration Appeals. For most aliens who find themselves in removal proceedings, the Board is the court of last resort. This is particularly serious in cases involving individuals seeking refuge from persecution. In many cases, their lives are

at stake. In an odd twist of logic, the Attorney General decided that the best way to eliminate the back log of cases that had accumulated at the Board would be to reduce the number of Board members from 23 to 11. Moreover, in making that reduction, he removed 5 highly qualified, very experienced jurists, who happened to have liberal views on immigration, and left a substantial number of members who had been appointed to the Board without any prior experience in immigration law. In addition, he created 90-day deadlines for a substantial percentage of the Board's new cases, creating an unnatural pressure on the remaining members to keep eliminate the back log and keep pace with new cases.

TERROR PROFILING

The events of September 11, 2001 have had a profound impact on racial profiling. Following the terrorist attacks, law enforcement agents have subjected individuals of Arab or South Asian descent, Muslims, and Sikhs to racial profiling. While national and local statistics are not yet available, anecdotal accounts how Arabs, Muslims, and Sikhs have endured racial profiling.

For example, in the months following September 11th, a new type of racial profiling has developed: "driving while Arab." Arabs, Muslim, and Sikhs across the country were subjected to traffic stops and searches based in whole or part on their ethnicity or religion. On October 4, 2001 in Gwinnett, Georgia an Arab motorist's car was stopped, he was approached by a police officer whose gun was drawn, and he was called a "bin Laden supporter" all for making an illegal U-turn. On October 8, 2001, two Alexandria, VA police officers stopped three Arab motorists. The officers questioned the motorists about a verse of the Koran hanging from the rear view mirror, and asked about documents in the back seat. The police officer confiscated the motorists' identification cards and drove off without explanation. He returned 10 minutes later, and claimed be had had to take another call. On December 5, 2001, a veiled Muslim woman in Burbank, IL was stopped by a police officer for driving with suspended plates. The officer asked the woman when Ramadan was over, asked her offensive question about her hair, and pushed her into his patrol car as he arrested her for driving with suspended plates. The woman was released from custody later that day.

A particularly egregious form of terrorism profiling occurs when Arab men and women are detained and deported without due process. Since September 11th, hundreds of Arab and Muslim individuals have been detained on suspicion of terrorist activity. Practically none of these individuals was involved with terrorism. However, many were detained for weeks and eventually changed with minor immigration violations. Based on these minor immigration violations some were deported. In one case, two Pakistani immigrants were arrested and detained 45 days for allegedly overstaying their visas.

In another case an Israeli was detained for 66 days before being charged with entering the United States unlawfully. In a particularly shocking case, a French teacher from Yemen, who was married to an American citizen and therefore eligible to become a citizen himself, was reporting for duty as an army recruit at Fort Campbell, KY on September 15, 2001. The man was apprehended by federal agents, separated from his wife and interrogated for 12 hours. The agents accused him of violating immigration laws, conspiring with Russian terrorists, spousal abuse, and threatened him with beatings. The man was given a lie detector test which proved he was telling the truth when he denied being associated with terrorists.

The fear of terrorism cannot give rise to discrimination, unfair immigrations policies, and denial of civil liberties for any Americans. The rising incidence of terrorism profiling should be major concern of the DOJ. I hope that measures are being established to ensure that our federal law enforcement agencies conduct the investigations needed to keep Americans safe without trampling on our personal freedoms.

CONCLUSION

Mr. Speaker and Mr. Ranking Member, in these times of war and terrorism, this Committee may have no greater responsibility than the oversight of the Department of Justice. I look forward to hearing the testimony of our witness Mr. Ashcroft. Thank you.

June 5, 2003

The HONORABLE JOHN D. ASHCROFT
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530

Dear Attorney General Ashcroft:

I am writing to ask you about a troubling situation that has come to my attention. I have become aware that Texas State Representative Richard Raymond has alleged that the Department of Justice inappropriately handled a Voting Rights Act complaint he filed with the Voting Section of the Civil Rights Division on May 7, 2003. As you know, Representative Raymond withdrew the complaint on May 11, 2003, alleging that the normal processes of the Department for such complaints were circumvented.

I am asking that you answer the following questions when you appear before the House Judiciary Committee on Thursday June 5th:

- Was the Department of Justice ever contacted by any outside parties concerning the Raymond complaint? If so, I request records of these contacts. In particular, I ask that you produce records of contacts with any Member of Congress, anyone representing themselves as acting on their behalf, made with the Department concerning this matter, as has been reported in newspaper stories.
- Did anyone in the Department of Justice ever contact any outside parties concerning the Raymond complaint? If so, I request records of these contacts.
- In Representative Raymond's case, did the Department follow the normal procedures it would use to open, assign and investigate a Voting Rights Act case? I have been informed that the case was directly referred directly to Assistant Attorney General Ralph Boyd's office instead of to the Department's Voting Section.
- Did the Assistant Attorney General for Civil Rights' office draft or prepare a response to Representative Raymond's complaint before it was withdrawn. Is this information correct? If so, since the case is now closed, I am requesting a copy of this letter.

I would appreciate a full and thorough response to these questions as you appear before our committee today.

Sincerely,

SHEILA JACKSON LEE,
Member of Congress

PREPARED STATEMENT OF THE HONORABLE ANTHONY D. WEINER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Since November 2000, attorneys for Jonathan Pollard, have been requesting access to the sealed portions of five documents that are in the court docket in United States v. Pollard, U.S. Dist. Ct., Dist. of Columbia, Case No. 86–0207 (TFH). The documents consist of a declaration by then-Secretary of Defense Caspar W. Weinberger, and several related documents. The classified portions of these five documents total approximately 35 to 40 pages. In 1987 they were made available to Mr. Pollard and his then-attorney. Despite the existence of a protective order that contemplates access by future attorneys for Mr. Pollard, no attorney for Mr. Pollard has been permitted to see these docket materials since Mr. Pollard was sentenced to life in prison on March 4, 1987.

Since May 2000, Mr. Pollard has been represented by Mr. Lauer and Mr. Semmelman. They are partners in the law firm, Curtis, Mallet-Prevost, Colt & Mosle LLP.

Upon entering the case, counsel applied to the DOJ for whatever security clearance was appropriate to view the classified docket materials. After a thorough background investigation, counsel were notified by the DOJ that they had been granted the appropriate "Top Secret" security clearance. Counsel asked the DOJ for permission to view the documents in a secure government facility. The DOJ refused.

Counsel filed a motion in the U.S. District Court for the District of Columbia, asking the court to allow access to the docket materials. In opposition to the motion, on January 11, 2001 an Assistant US Attorney represented to Judge Norma Holloway Johnson that counsel "don't have the right clearances," namely, the Sensitive

Compartmented Information ("SCI") clearance needed to access the docket materials. As a result, the Judge refused to allow access.

On August 3, 2001, DOJ court security officer Michael Macisso admitted in writing that these attorneys had the proper security clearances, and that, contrary to the representation made to Judge Johnson, the DOJ's background investigation had determined them fully eligible for "SCI" clearance.

Based upon Mr. Macisso's letter, Mr. Pollard's attorneys filed a motion with the U.S. District Court on August 16, 2001 asking the court to modify its ruling on the ground that it was based upon a false representation by the government, namely, that counsel lacked the proper clearance to view the documents. That motion has been pending now for almost 22 months. It was opposed by the DOJ and remains undecided by the court.

On September 10, 2001, Assistant Attorney General Daniel J. Bryant informed me in writing that between 1993 and 2001 there have been at least 25 instances of access to these docket materials by government staff. Because the documents are court filings—not intelligence reports—it is evident that these 25 instances of access relate to efforts by government personnel to oppose relief for Pollard.

Mr. Attorney General, on June 6, 2001, you testified before this Committee. I asked you if there was any reason why I should not be accorded access to the sealed sentencing memorandum submitted by Secretary Weinberger. I also told you that Mr. Pollard's new attorneys were being denied access to the document by the DOJ. I asked you if you would agree to accord them access. You told me you would look into the matter.

I did not receive any further communication from you. On January 7, 2002, I wrote to you, reminding you of your statement to me, and providing you with additional information about the case. I received no response to my letter.

Since then, the DOJ has vigorously opposed a request by Mr. Pollard's attorneys for a status conference with the court to discuss how it came about that the DOJ made an incorrect representation regarding counsel's clearance level, and why the DOJ was resisting every effort to correct the record and to establish the truth.

A recent article by John Loftus, a former DOJ attorney, indicates that at Mr. Pollard's sentencing the government erroneously attributed to Mr. Pollard serious acts of wrongdoing that were later determined to have been the work of Aldrich Ames. Mr. Loftus contends the government is continuing to this day to perpetuate a cover up of this mistake.

As a Member of Congress and of this Committee, I am deeply disturbed by the DOJ's resistance to allowing Mr. Pollard's attorneys, as well as myself, to see the docket materials. Mr. Pollard's attorneys plainly need to know what is in these documents so that they can represent their client effectively. I am likewise disturbed by the documented evidence that a DOJ attorney made a false statement to the court regarding counsel's level of clearance, and by the DOJ's refusal to rectify the record and do what is just in this matter.

QUESTION 1: Since the DOJ has allowed at least 25 instances of access to the docket materials by government staff opposing efforts on behalf of Mr. Pollard, on what basis does the DOJ continue to oppose efforts by Mr. Lauer and Mr. Semmelman, security-cleared attorneys for Mr. Pollard, as well as myself, a Member of Congress, to look at these 16-year-old court documents in a secure location? Wouldn't you agree that Mr. Pollard's attorneys and a Member of Congress have as much need to know what is in these documents as do the government staffers who have been permitted access to the documents at least 25 times to oppose relief for Mr. Pollard?

QUESTION 2: When the Assistant US Attorney incorrectly told the Judge in 2001 that counsel lacked the proper clearances, was that just an error or was the DOJ provided with false information by another agency? Why has there been such resistance by the DOJ to rectifying the record and establishing the that the attorneys have the proper clearance? What will you do to rectify this?

Linda J. Sells

Law Enforcement, State and Local Officials, Community Leaders, Editorial Boards, and Opinion Writers Voice Opposition to Local Enforcement of Immigration Laws

Police Departments

Houston (TX) Police Department, Spokesman Robert Hurst
"We are in the business of investigating crimes—not enforcement of immigration laws."
("Houston police stick to hands-off immigrant policy," *Houston Chronicle*, 3/3/2003)

Seattle (WA) Police Department, Chief Gil Kerlikowske
"We didn't want to be perceived as a branch of the [Immigration and Naturalization Service]. Our mission is to protect people and not frighten people."
("'Don't ask' immigration policy urged for city workers, police," *Seattle Post-Intelligencer*, 12/11/02)

Chicago (IL) Police Department, Tom Needham, Former General Counsel and Chief of Staff
[Noting that the mission of police is to prevent and solve crimes] "It would be virtually impossible to do that effectively if witnesses and victims, no matter what their residency status, had some reluctance to come forward for fear of being deported."
("U.S. Weighs Local Role on Immigration," *Chicago Tribune*, 4/14/02)

Los Angeles (CA) Police Department, Sgt. John Pasquariello
"Because of our immigrant population here and our diverse communities, we don't want to alienate anybody, or give anybody fear...That's just not our policy. Hasn't been for twenty years."
("Police Want No Part in Enforcing Immigration," *Los Angeles Times*, 4/5/02)

Austin (TX) Police Department, Assistant Chief Rudy Landeros
"Our officers will not, and let me stress this because it is very important, our officers will not stop, detain, or arrest anybody solely based on their immigration status. Period."
("Austin Police Won't Arrest People Only for Immigration Status," KEYE CBS, Austin, 4/5/02)

Denver (CO) Police Department, Chief Gerry Whitman
"Communication is big in inner-city neighborhoods and the underpinning of that is trust. If a victim thinks they're going to be a suspect (in an immigration violation), they're not going to call us, and that's just going to separate us even further."
("Immigration Bill Has Police Uneasy," *Denver Post*, 4/22/02)

San Diego (CA) Police Department, David Cohen, Spokesperson
"Our policy has been and continues to be that we are not federal immigration officers, and our department guidelines for dealing with undocumented persons are very strict and are unlikely to change."
("Police May Gain Power to Enforce Immigration," *San Diego Union-Tribune*, 4/3/02)

Miami (FL) Police Department, Lt. Bill Schwartz, Spokesperson
"We will not function in an INS capacity. It's not our job. Our job is to solve crimes. We have way too much to do to be acting as INS agents."

("Some Police Eager to Help INS Agents," *Orlando Sentinel*, 4/5/02)

San Antonio (TX) Police Department, Chief Albert Ortiz
"Any time we get mandates and more work without a commensurate amount of resources, something has to suffer. One of the beauties of living in San Antonio is we have a lot of diversity and we seem to pull together. If that [mandate] happens, we'd really have to think very hard about where it would be on our priority list, and if it would even be a priority...We've tried so very hard for years to build bridges to all segments of our community. This would be a setback in that regard."
("Sheriff, Top Cop Blast INS Proposal," *San Antonio Express News*, 4/5/02)

Montgomery County (MD) Police Chief Charles Moose
"We enforce criminal laws and INS enforces INS laws. . . . We try to build relationships with people in order to serve them, in order to assist them. Now this movement by the federal government to say that they want local officers to become INS agents is against the core values of community policing: partnerships, assisting people, and being there to solve problems. . . . I think it would be totally inappropriate to go down that path."
("Ask the Chief," WTOP Radio, 5/29/2002)

Ventura County (CA) Sheriff's Department, Eric Nishimoto, Spokesperson
"We're not in favor of having our department being responsible for that function. The number one risk is the potential for civil rights violations. Right now we're involved in preventing any kind of racial profiling and this type of function could open us to that kind of risk...We feel our officers are not equipped to make that kind of determination of who is legal. In the 70's, one of our tasks was to round up illegals and it was very difficult to make that kind of determination. From a practical standpoint, we're not staffed to do that, especially in this time of budget reductions."
("Proposal for Police to Act as INS Agents Denounced," *Ventura County Star*, 4/6/02)

San Joaquin County (CA) Sheriff's Office, Lt. Armando Mayoya
"If police officers start reporting to the INS, more undocumented workers could wind up as victims. Criminals soon would realize that undocumented workers would be unlikely to call police for fear of being deported and target them for attacks. Racial profiling also could intensify if police are tasked with upholding immigration laws, and it wouldn't just be Latinos targeted by police."
("U.S. May Let State, Local Authorities Enforce Federal Immigration Laws," *Dallas Morning News*, 4/3/02)

Whatcom County (WA) Sheriff Dale Brandland
"My current policy is that if we run into an illegal alien, we detain them for the Border Patrol. We don't actively pursue illegal aliens. . . . We are underfunded as it is and to try to take on that responsibility is just unacceptable. . . . [The federal government has been trying to get us to do this] for years and quite frankly it just doesn't work. . . . It's really a sore subject for me. If there is a legitimate interest here, if there is a risk to our communities, we want to be a part of the team. What I would not do is go out and start hunting for illegal aliens just because John Ashcroft says I'm allowed to."
("Police balk at watching for illegal immigrants," *Seattle Post-Intelligencer*, 5/2/2002)

Metropolitan Nashville (TN) Police Department, Don Aron, Spokesperson
"We don't have any desire for all 1,300 members of the Police Department to be quasi-INS agents."
("Midstate Authorities Balk at Possibly Enforcing Immigration Laws," *The Tennessean*, 4/15/02)

Stockton (CA) Police Department, Chief Edward Chavez

standing right on the same corner where my grandfather Carmine did when he came from Italy, to wait for people to pick him up for work."
("Policing Immigration," *Bergen Record*, 4/22/02)

New York (NY) Police Department, Chief Michael Collins
[A New York City executive order forbids the police department from checking the immigration status of crime victims, persons seeking assistance, or coming forward as witnesses] "This will not change. The most important thing is that people should not be afraid to come to us for help."
("INS Work Improper for NYPD," *New York Daily News*, 5/6/02)

Minneapolis (MN) Police Department, Chief Robert Olson
"We are not the INS, and we do not want to be the INS. That is a federal issue. . . . We want victims of crime to come to us and not fear being turned in to the INS."
("Olson, Rybak look to improve relationship with Somalis," *Minneapolis Star Tribune*, 6/7/02)

Tucson (AZ) Police Department, Chief Richard Miranda
"I do not believe it is appropriate to allocate the limited resources of the Tucson Police Department to the issue of immigration control. We have worked hard to build bridges and establish partnerships with the diverse population of our city. I believe that taking on the additional role of enforcing immigration laws would jeopardize those relationships and create unneeded tension in our community."
("Expansion of foreigner arrest plan is feared," *Arizona Daily Star*, 7/12/2002)

Tucson (AZ) Police Department, Chief Richard Miranda
"Under no circumstances are persons to be stopped or interrogated simply on the suspicion that a person is illegally in the country."
("No way to fight terror," *Arizona Daily Star*, 6/20/2002)

Pima County (AZ) Sheriff Clarence Dupnik
"As a general rule, I wouldn't want our people certified as having the authority of a Border Patrol officer."
("Officials wary of border policing," *Arizona Daily Star*, 8/1/2002)

Bolder (CO) Police Department, Sheriff Joe Pelle
Echoing the policy of his predecessor, Sheriff George Epp, Pelle said that as sheriff he would not order the county's deputies to enforce federal immigration laws. "Part of local policing includes building trust," he said.
("Tancredo targets I.D.s," *Colorado Daily*, 11/14/2002)

Police Associations and Unions

California Police Chiefs Association, Chief Bob McConnell, President
"[I]t is the strong opinion of the California Police Chiefs Association leadership that in order for local and state law enforcement organizations to continue to be effective partners with their communities, it is imperative that they not be placed in the role of detaining and arresting individuals based solely on a change in their immigration status."
(Letter to Attorney General John Ashcroft, 4/10/02)

Police Foundation, Hubert Williams, President

"Most police departments have discovered that they need to develop better relationships with immigrant communities – many of who are already paranoid about uniformed government agents – if they are to solve crimes in those communities. How likely are illegal workers to give police tips on crimes if they fear arrest because they lack 'papers?'

Sending local police after undocumented workers would be a disastrous policy – and the taxpayers would end up paying for it. There would be more lawsuits such as the one following an ugly joint operation by the U.S. Border Patrol and local authorities in Chandler, Ariz., in 1997. Even U.S. citizens were arrested when they couldn't produce documents proving legal residence. They sued."

***San Diego Union-Tribune*, "No Local Role," 4/4/02**
"Mandating immigration responsibilities for cops – or school crossing guards, Boy Scouts or vigilantes, for that matter – is a terrible idea, little more that a cop-out by the federal government. If the INS is incapable of doing its job, then Congress should fix it. But do so at the federal level."

***Newsday*, "Alien Idea," 4/8/02**
"People in the country illegally would be forced further underground. Crime victims and witnesses without green cards would not cooperate with police or courts, if doing so meant risking deportation. Fueled by a heightened paranoia, some immigrants would pull their children out of school, avoid public hospitals and any other services that could bring them to the attention of local authorities. The predictable result would be a community-wide deterioration of public health and safety."

***San Francisco Chronicle*, "Who should enforce immigration laws?" 5/18/2002**
"The proposed policy would immediately destroy cooperation between police and undocumented immigrants. Anyone whose papers aren't in order would never report a crime, such as murder, muggings, domestic violence and theft, to the police or offer information, because merely doing so would ensure that he or she would be arrested and deported."

***Houston Chronicle*, "Houston officers' job is not immigration enforcement," 5/24/2002**
"Houston police officers do not inquire about the visa or residency status of the people they encounter on their beats, not because it makes doing the job easier, but because it makes doing the job possible. . . . Especially in the wake of the Sept. 11 terrorism attacks, Americans are jittery about the "foreigners" in their midst. But many people who speak accented English or a foreign language, who have a darker complexion or who wear "funny" clothes are perfectly legal residents, or even American citizens. In the course of a police investigation, how are officers supposed to determine who is who? Rest assured that residents of certain communities would be hassled regularly to show proof of citizenship—which no one is required, for the time being, to carry–while others would escape this official harassment."

***Arizona Daily Star*, "No way to fight terror," 6/20/2002**
"Local police departments do not have the resources to add new and costly layers of law enforcement duties to their already lengthy responsibilities. Moreover, local police departments can pick from any number of objections to oppose Ashcroft's plan—all based on problems that immigration enforcement is projected to create for local police. One of those would be the tacit approval of racial profiling—a police tactic that most departments around the country have already rejected as more divisive than helpful. A more onerous result predicted by police is that the relationship between police and immigrants will be destroyed. The concern is that when a crime occurs, immigrants will be reluctant to contact police for fear of being jailed. It is a simple relationship of trust."

enforcing complex immigration law without adequate training or experience would likely result in false arrests and the detention of people who merely appear to be foreign-born or who speak a language other than English."
(Letter to Attorney General John Ashcroft, 4/11/02)

Representatives Lincoln Diaz-Balart (R-FL) and Ileana Ros-Lehtinen (R-FL)
"We are concerned that your proposal to grant authority to local police departments to enforce federal immigration laws will irreparably damage the delicate relationship between police and immigrant communities and undermine effective immigration enforcement...By giving local police departments the power to enforce immigration laws, community-policing efforts will be endangered. The trust these localities have built between citizens and officers will be hampered if the local police are employed as a federal agency."
(Letter to Attorney General John Ashcroft, 4/25/02)

House Democratic Leader Richard Gephardt (D-MO)
"Since September 11, the workload and responsibilities of law enforcement agencies have increased dramatically. Adding enforcement of immigration laws to their duties would increase this burden and, as local authorities have argued, would hurt efforts to build relationships with immigrant communities who would be afraid to report crimes."
(Statement, 5/15/02)

Representative Silvestre Reyes (D-TX), Chair of the Congressional Hispanic Caucus
"We [the Congressional Hispanic Caucus] understand and appreciate the need for our law enforcement agencies and departments to have a coordinated approach to confront all threats and to apprehend those who would do us harm. However, burdening local and state police officers with enforcing immigration laws is simply not a good idea."
(Statement, 5/23/2002)

Representative Robert Menendez (D-NJ)
"[T]he way to make our nation safer is not to alienate large segments of the population; it is not to make people fear their local police. When large segments of the community are afraid to work with the police and are afraid to come forward and report crimes, then police have a harder time enforcing laws. As a former mayor, I have seen first hand how important it is for a local police force to have a good relationship with the community it serves. There must be an equal sense of trust and respect."
(Statement, 5/23/2002)

Representative José Serrano (D-NY)
"The idea [of having local police enforce civil immigration law] was developed without full consideration of its ramifications. It will undermine trust in and cooperation with the police by immigrant communities. It will lead to expanded racial profiling. And it could cost the Federal government when those local and state authorities come seeking reimbursement."
(Statement, 5/23/2002)

Representative Jan Schakowsky (D-IL)
"Allowing state and local police to enforce the civil component of federal immigration law would be detrimental to all Americans. Immigrants would become more suspicious of and less willing to work with local police. When large segments of the community are afraid to come forward and report crimes or testify in criminal cases, police have a very difficult time enforcing laws."
(Letter to Attorney General John Ashcroft, 5/31/2002)

"It would be a terrible mistake for the NYPD to participate in the enforcement of immigration laws. There has to be a positive police-community relation and if the NYPD gets involved in doing INS work, immigrants are going to trust the police even less."
("INS Work Improper for NYPD," *New York Daily News*, 5/6/02)

Francie Noyes, press secretary for Arizona Governor Jane Hull (R)
"If they [the INS] need help, they should add to the federal resources."
("Police can now be drafted to enforce immigration law," *Christian Science Monitor*, 8/19/2002)

Community Leaders and Advocates

Most Reverend Thomas G. Wenski, Auxiliary Bishop of Miami and Chairman, Committee on Migration of the United States Conference of Catholic Bishops
"We believe that if carried out, such proposals would undermine the safety of both immigrants and citizens, and would overburden law enforcement... [Undocumented immigrants] will be less likely to report crimes that they witness and to cooperate with police and prosecutors in investigating and prosecuting crimes. This will hurt immigrants as well as the wider community, by undermining the efforts of law enforcement and local communities to fight crime."
(Letter to Attorney General John Ashcroft, 4/23/02)

Raymond Flynn (Catholic Alliance, former mayor of Boston), David Keene (American Conservative Union), and Grover Norquist (Americans for Tax Reform)
"[W]e believe that the policy change contemplated by the Department of Justice represents a dramatic shift which is likely to undercut local law enforcement while raising troubling new questions about the intersection of local law enforcement and Federal law. We support the efforts of this Administration to fight terrorism at home and abroad, but believe such efforts are ill served by sweeping and unnecessary policy changes that would have far broader implications for a free society."
(Letter to President George W. Bush, 5/30/2002)

Several National Ethnic, Religious, Civil Rights, and Immigrant Advocacy Organizations
"We believe that expanding the purview of state and local law enforcement officers to include civil immigration law could have serious, detrimental effects on community safety. We fear that the damage this arrangement would do in eroding non-citizens' trust in law enforcement could have far-reaching and unintended consequences, and we respectfully ask that your administration reject this proposal."
(Letter to President George W. Bush signed by American Immigration Lawyers Association, Arab American Institute, Leadership Conference on Civil Rights, League of United Latin American Citizens, Lutheran Immigration and Refugee Service, Mexican American Legal Defense and Educational Fund, National Association of Latino Elected and Appointed Officials Educational Fund, National Council of La Raza, National Immigration Forum, and Southeast Asia Resource Action Center, 4/24/02)

52 National and Local Organizations, Businesses, and Attorneys
"This ill-conceived policy reversal will almost certainly increase racial profiling of both immigrants and non-immigrants at the hands of law enforcement authorities...any trust that currently exists will be shattered and violent crime against immigrants, from muggings to modern-day slavery, will almost certainly rise. The key to providing adequate police protection to immigrant communities is to build trust in the authorities, not to build new walls between the community and the police."
(Letter to President George W. Bush and Attorney General John Ashcroft, 4/24/02)

("Ruling Clears Way to Use Police in Immigration Duty," *The New York Times*, 4/4/02)

John Dulles, Regional Director, U.S. Civil Rights Commission, Denver, Colorado
"No other metropolitan area in the United States considered cross-deputization after Salt Lake City voted it down. Folks all over the country were aware of that happened in Salt Lake City, and even the Justice Department backed off to some extent... Public safety police functions are not compatible with making determinations about who is in this country illegally. Most police departments have passed policies to limit cooperation with immigration authorities. They don't want a part of the community fearful of reporting crimes or cooperating."
("Rights Advocates Slam Plan for Local Police to Enforce Immigration Laws," *Salt Lake Tribune*, 4/5/02)

Jennifer Corrigan, Public Policy Director, Colorado Coalition Against Domestic Violence
"Studies consistently show that battered women often do not access the criminal justice system because abusers feed them misinformation about the laws in this country. The Department of Justice proposal would make abuser's threats real. It would give batterers an extra tool for exerting control over their victims and give U.S. citizen and lawful permanent resident batterers free reign to continue to commit the crime of domestic violence, free from the fear that their partner will report them. Is this the message that the Department of Justice wants to send to victims of crime?"
(Statement, 5/30/2002)

Margie McHugh, Executive Director, New York Immigration Coalition
"This would have a devastating effect on immigrant communities because...immigrants would feel they can't come forward to report crimes for fear of deportation."
("U.S. May Seek Local Aid in INS Enforcement," *Newsday*, 4/4/02)

Cheryl Little, Executive Director, Florida Immigrant Advocacy Center
"It's going to make our community less safe, because immigrants are going to be less likely to trust the local police. This is going to drive people further underground."
("Immigrant Activists Rip Proposal," *Miami Herald*, 4/25/02)

Laura Murphy and Timothy Edgar, American Civil Liberties Union
"Involving state and local law enforcement in immigration status issues will have a severe impact on the civil rights and civil liberties of immigrant communities. Such a policy will increase racial profiling and other unjustified stops, not only of undocumented workers, but also of legal residents and United States citizens who 'look foreign.' As you are aware, many of these problems have plagued earlier efforts of state and local law enforcement officers to become involved in civil immigration enforcement. For example, an effort in 1997 in Chandler, Arizona on the part of local police to enforce immigration laws resulted in widespread civil rights abuses, including unjustified arrests of legal residents and citizens of Mexican descent, severely strained police and community relations, and lead to substantial liability on the part of the municipality."
(Letter to Attorney General John Ashcroft, 6/4/2002)

Frank Delgadillo, Orange County (CA) Congregation Community Organization
"This is going to affect our community. As it is, people are afraid of the police. They're afraid to report what's happening in the community."
("Immigrants Worried, Coe Pleased by Proposal," *Orange County Register*, 4/4/02)

Teresa Ortiz, President, Casa Guanajuato (TX)

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

February 13, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed please find responses to questions posed by the Committee to the Attorney General following the Committee's hearing of June 5, 2003, concerning oversight of the Department of Justice. Our responses are divided into two parts: those concerned with implementation of the USA PATRIOT Act and those concerning other matters.

We regret the delay in responding but hope that this information will prove helpful to you. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosures

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

June 23, 2003

The Honorable John D. Ashcroft
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear General Ashcroft:

On behalf of the entire House Committee on the Judiciary, we would like to thank you for your appearance before the Committee's June 5, 2003 oversight hearing on the Department of Justice. Your testimony before the Committee concerning the implementation of the PATRIOT Act and the Department's ongoing war against terrorism was of crucial importance and will help guide the legislative and oversight priorities of the Committee in the coming months.

To provide the Committee with a more detailed understanding of current activities at the Department, we ask that you provide written responses to the following questions by September 1, 2003. Your responses to these questions will be included in the June 5, 2003 Committee hearing record.

Thank you again for your service and for your cooperation with this request.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

JOHN CONYERS, JR.
Ranking Member

FJS/rt

The Honorable F. James Sensenbrenner, Jr., Chairman

1. The Department had previously advised this Committee that the FBI and the Department were taking additional steps to improve the efficiency of the Foreign Intelligence Surveillance Act (FISA) process. One of these steps was the creation of a FISA unit in November 2002, at FBI Headquarters that was charged with instituting an automated tracking system that would electronically connect the field divisions, FBI Headquarters, the FBI's National Security Law Unit, and the Office of Intelligence Policy Review (OIPR).

    a. What is the status of this automated tracking system?
    b. What are the other duties of the FISA unit?
    c. Has operational efficiency improved since the Unit was created?
    d. What other steps have been implemented to achieve optimum efficiency in the FISA application process?

2. Section 326 of the USA PATRIOT ACT requires financial institutions to implement reasonable procedures to verify the identity of any person seeking to open a bank account. The Treasury Department has promulgated regulations that would permit these institutions to accept identification cards issued by embassies and consulates of foreign governments, which can be susceptible to fraud. What is the DOJ's position on the Treasury Department's implementation of section 326 of the USA PATRIOT Act?

3. Has the United States Department of Justice offered any classified evidence in immigration proceedings that have been instituted since September 11, 2001?

4. In May 2003, the Justice Department published an interim regulation that provided a mechanism for the government to ask an immigration judge to place a "protective order" upon information that, while not classified, was sensitive and could damage law enforcement or national security interests if released beyond parties to a specific immigration case.

    a. What are the government's concerns that prompted it to authorize protective orders in immigration cases?
    b. Is this "protective order" mechanism the Justice Department's alternative to closed hearings?
    c. In how many cases have protective orders been requested? Have any protective orders been granted?
    d. If a protective order is granted, do the alien and the alien's counsel get access to the protected information?
    e. Can the alien challenge the admissibility of the evidence that is protected by such an

order?

f. Do Federal court judges have a similar ability to issue protective orders to prevent the dissemination of information introduced in Federal court?

g. Can a government attorney be sanctioned for disclosing information in violation of an immigration judge's protective order?

5. Section 411 of the USA PATRIOT Act amended the Immigration and Nationality Act to broaden the scope of aliens ineligible for admission or deportable due to terrorist activities. In its May 13, 2003 response to Committee questions on USA PATRIOT Act implementation, the Department stated that: "Prior to the transfer of the INS to DHS, the INS had not relied upon the definitions in section 411 to file new charges against aliens in removal proceedings."

a. Does this mean that the Justice Department has not concluded that any of the aliens with whom it has dealt since the passage of the USA PATRIOT Act in October 2001 were terrorists? If not, why weren't these aliens charged under these provisions?

b. Have any aliens been charged with any terrorism-based ground of removal since September 11, 2001? If so, are these the only aliens with terrorist ties who have come to the attention of the Justice Department since September 11, 2001?

c. Are there reasons that the Justice Department or INS would not have charged an alien believed to have a connection to a terrorist group or terrorist acts with a terrorism-related ground of removal? If so, why?

d. How many aliens have been charged on terrorism-related criminal grounds since September 11, 2001? Are these the only aliens whom the Justice Department believes are related to terrorism?

e. Are there any reasons why the Justice Department would deport an alien who is suspected of terrorist ties or of engaging in terrorist activities rather than charging the alien criminally? Why would the Justice Department do this? Has the Justice Department done this?

6. The Department of Justice took a major step in tightening border security after September 11 by implementing the National Security Entry-Exit Registration System (or NSEERS), which required aliens to be fingerprinted, photographed and registered, both at the ports of entry and domestically. While control over this initiative passed to the Department of Homeland Security, what results do we have to show for this effort? Have any aliens linked to terrorism been identified through NSEERS? If so, how many? And have any criminal aliens been arrested through NSEERS?

7. How does the Civil Rights Division and the U. S. Attorney's office coordinate with local prosecutors in instances where civil rights cases are being prosecuted locally?

The Honorable Lamar Smith, Chairman, Subcommittee on Crime, Terrorism and Homeland Security

8. It is widely acknowledged that our nation's critical infrastructure is vulnerable to terrorist attacks. While we work to secure our airports, highways, and power plants, we must also ensure cyberspace is protected.

   a. Are we prepared to deal with the possibility of a cyber attack?
   b. Have you increased the level of prosecution for cyber crimes? If not, why? If so, can you quantify any decrease in the amount of cyber crime committed against interests in the United States?

The Honorable Chris Cannon, Chairman, Subcommittee on Commercial and Administrative Law

9. Press reports indicate that there may be a disagreement, or at the least, a debate within the government as how to proceed with the prosecution of Zacarias Moussaoui, now awaiting trial in federal court in the Eastern District of Virginia. The prosecution seems to be subject to an inordinate delay and it appears that the federal judge presiding in that case has questioned whether a federal criminal court is the appropriate forum. The *Washington Post* has characterized recently released court documents as revealing "a government and court system uncertain how to proceed against Moussaoui in a civilian court while trying to conduct an international war on terrorism and maintain national security." The judge reportedly has indicated that the Department of Justice's decision to try Mr. Moussaoui in a federal criminal court carried with it legal consequences and responsibilities.

   a. Were the legal consequences and responsibilities of trying this matter in a federal criminal court contemplated?
   b. Are you satisfied that a civilian court, and that one located in the Eastern District of Virginia, is the appropriate place to prosecute Mr. Moussaoui and, if so, are you satisfied with the progress of that case?
   c. If that prosecution continues, can you predict when an actual trial is likely to begin or do you foresee continuing pre-trial motions, rulings and appeals which will further delay the matter?

10. During the 107th Congress, the House of Representatives passed the Federal Agency Portection of Privacy Act (FAPPA) requiring federal agencies to include a privacy impact analysis to be commented upon by the public when issuing regulations.

a. In a time when the threat of terrorism has caused the government to take unprecedented actions that understandably impact upon traditional spheres of personal privacy, would it not allay many citizen concerns about government intrusion and overreaching if new regulations were drafted with an articulated consideration of those citizen concerns?
b. Can we anticipate the support of the Department of Justice for legislation, such as FAPPA, which follows a reasonable approach and takes moderate steps to insure federal regulations consider legitimate privacy concerns?

11. Does the Justice Department, any agent of the Department, or contractor on behalf of the Department investigate or maintain files on people who are not legitimate suspects of crime or terrorism?

12. You may recall that I asked you during the June 5th hearing to comment on whether you were aware of any data-mining efforts by any component within the Justice Department that collects information on individuals other than criminal suspects. As a follow-up to that query, I mentioned that I may want you to respond in writing.

a. Accordingly, would you please provide your written response?
b. In addition, are you aware of any agent of the Department or contractor on behalf of the Department that collects information on individuals other than criminal suspects?
c. Does the Department investigate or maintain files on people who are not legitimate suspects of crime or terrorism?

13. What were the data sources used to identify the detainees rounded up following the September 11, 2001 attacks?

14. On May 31, a *Philadelphia Inquirer* editorial made the following observations:

Why, for instance, have so many criminal cases been mislabeled as instances of international terrorism? As Inquirer staff writer Mark Fazlollah has documented, dozens and dozens of people charged in such cases have proven to be unconnected to terror groups. Could someone be trying to hype the antiterrorism benefits of the new powers to build a case to extend them even further?

In New Jersey, federal prosecutors recently pulled 65 Middle Eastern students' cases from terrorism lists. They said the students' hiring of stand-ins to take English exams for college was not terrorism-related.

What is your response?

15. What would be your reaction to legislation that required the Justice Department to provide the following information to Congress on an annual basis:

a. a public report on the total number of U.S. persons targeted for court orders under FISA and the number of persons targeted for electronic surveillance, physical searches, pen registers and business records; the names and identities of those targeted would not have to be revealed;
b. a public report on the number of times that information acquired through a FISA order is authorized for use by the Attorney General in criminal proceedings; and
c. a report to the House and Senate Judiciary Committees on surveillance of public and university libraries?

16. I think that there are two ways to look at the Fourth Amendment of the Constitution from a law enforcement perspective. One view gives it an interpretation favoring efficiency over personal protection. In other words, giving law enforcement the benefit of the doubt. The other views it as an ideal embodying traditional preservation of individual privacy rights that mandates the inefficiency of search and seizure for the sake of maintaining those rights.

Which view point is yours and how have you specifically implemented that philosophy within the Department?

The Honorable Tammy Baldwin

17. Terrorism Investigations and Use of Statutory Authority

Prior to enactment of the USA PATRIOT Act, the evidentiary standard for a FISA order for business records was relevance and "specific and articulable facts" giving "reason to believe" that the person to whom the records related was an agent of a foreign power. The PATRIOT Act dropped the additional requirement that there be "specific and articulable facts giving reason to believe" that the person to whom the records related was an agent of a foreign power. So these records simply need to be relevant to a terrorism investigation.

a. Does this permit the Department to obtain the business records of a person who is not an agent of a foreign power but is the target of a terrorism investigation?
b. Does this also apply to a U.S. person who is the target of the investigation?
c. Does this also apply to an American citizen who is the target of the investigation?
d. Can the Department obtain the business records of a person who is not an agent of a foreign power nor the target of a terrorism investigation if it is determined that the records sought are relevant to such an investigation?
e. Does this also apply to a U.S. person who is not an agent of a foreign power nor the target of a terrorism investigation?
f. Does this also apply to an American citizen who is not an agent of a foreign power nor the target of a terrorism investigation?

18. During your testimony, there was some confusion about the scope of Section 215 of the USA

PATRIOT Act. Please clarify which types of records could be obtained under Section 215.

a. Does that include:
Book purchase records?
Library records of materials checked out?
Computer records?
Medical records?
Pharmaceutical records?
Educational records?
Firearm purchase records?
Membership lists from a club or association?
Membership lists from a religious institution?
Membership information (e.g. payments, services used, etc…)?
Tax records held by a tax preparer?
Political contributions?
Genetic information?

b. Has the Department used Section 215 authority to obtain:
Library records of materials checked out?
Computer records?
Medical records?
Pharmaceutical records?
Educational records?
Firearm purchase records?
Membership lists from a club or association?
Membership lists from a religious institution?
Membership information (e.g. payments, services used, etc…)?
Tax records held by a tax preparer?
Political contributions?
Genetic information?

c. Could the Department request an entire database of a business, association, religious institution or library under Section 215?

19. In his July 26, 2002 letter to the Judiciary Committee, then-Assistant Attorney General Daniel J. Bryant stated, in regard to Section 215, that "Under the old language, the FISA Court would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and "specific and articulable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. **The PATRIOT Act changed the standard to simple relevance**" (emphasis added).
On numerous occasions in statements to the news media, DOJ spokespersons have stated that in order to examine someone's library records or book purchase records they must be an agent of a foreign power. As recently as May 22, 2003, the Associated Press reported that according to DOJ spokesman Jorge Martinez "the law only gives agents the power to research the library habits of 'agents of a foreign power' and won't be used to investigate 'garden-

variety crimes'..."We're not going after the average American, we're just going after the bad guy."---"Library Privacy; Librarians find ways around USA PATRIOT Act" by Allison Schlesinger of the Associated Press. DOJ spokesman Mark Corallo was quoted in the *Bangor Daily News* on April 4, 2003 saying that critics of Section 215 were "misleading the public" and that "the fact is the FBI can't get your records." It appears these statements are not true.

a. Why are your spokespersons providing conflicting information about this law?
b. What steps are you and the Department taking to ensure that accurate information is disseminated to our citizens?

20. Section 215 does not allow an investigation of a U.S. person if such an investigation is conducted "solely upon the basis of activities protected by the First Amendment to the Constitution."

a. Would this limitation still allow an investigation based in part on activities protected by the First Amendment?
b. What definition of "activities protected by the First Amendment" is used by the department in evaluating a request for a FISA order?
c. What procedures are in place to ensure that such orders are not sought solely on the basis of activities protected by the First Amendment of the U.S. Constitution?

21. DOJ spokesman Mark Corallo has been quoted as saying that the Department is considering holding public hearings around the country to explain and debate the USA PATRIOT Act (*Bangor Daily News*, April 4).

a. Will the Department conduct a series of public hearings around the country on this topic?
b. If so, will you make available high ranking DOJ officials to participate in these hearings to listen directly to the public?
c. Will you provide other opportunities for the public to give input and feedback about changes to our criminal and foreign intelligence investigation laws and guidelines made since September 11, 2001 with the stated purpose of assisting in the war on terrorism?

22. As you know, a draft of the so-called PATRIOT Act II has been circulating in the media and on the web for several months. I accept your testimony that you are not planning to introduce it now or in the future in its current form. However, as you know, the USA PATRIOT Act was rushed through Congress with little time for the kind of extensive debate typically given to such a proposal. We can debate the need for moving it so quickly at that time, but I think we can agree that it was a very significant expansion of prosecutorial and investigative authority.

a. Will you promise to engage in a full and complete debate over any additional powers or

authorities that you request in the future?

b. Can we have your personal assurance that you and the Department will not try to pressure the Congress, directly or through the media, to act on requests for expanded authority prior to a full and complete debate?

23. The USA PATRIOT Act made numerous changes that enhanced the power of the federal government to investigate and prosecute terrorism threats and crimes. Some of these powers apply only to terrorism investigations, while others are tools that apply to all federal investigations. Now that you have had time to use many of these tools, it would be very helpful to our oversight efforts to know which ones the Department finds most valuable and useful and which ones are less important, not used frequently, or unnecessary.

a. Can you tell us which authorities have proved most useful and why?
b. Can you also tell us which have not proven particularly useful and why?
c. Can you tell us which authorities have not been used?
d. Are there any authorities changed in the USA PATRIOT Act that you recommend Congress reverse or further limit?

24. As Attorney General you are charged with protecting and defending the rights guaranteed to American citizens in the Constitution. That includes their safety and security, but it also includes their liberty and freedom.

a. What recommendations would you make to modify the changes made in the USA PATRIOT Act to better protect the liberty and freedom of U.S. persons without significantly compromising our need to protect safety and security?
b. Are their additional protections, beyond modification to the USA PATRIOT Act, that you can recommend to Congress to better protect our liberty and freedom?

The Honorable Jeff Flake

25. The response from the Department of Justice to the Committee's questions concerning its use of the USA PATRIOT Act states that DOJ has used "sneak and peek" warrants on 47 separate occasions, and have sought to extend the period of delay for notice 248 times.

Have these warrants been used in ordinary criminal cases, such as drug prosecutions unrelated to terrorism? If so, how many times?

26. Some libraries have made a practice of destroying computer records and other records in defiance of the PATRIOT Act, saying that they don't agree with it. These institutions are attempting to make it more difficult for the Justice Department to come in and actually search those records.

a. Has any investigation been stymied as a result of this?

b. Has the Justice Department sought information that it learned has been destroyed by any of the libraries?

27. I have learned that university officials in Arizona have approached the FBI in an attempt to assist with ongoing investigations on students suspected of terrorism. The university administration asked if it might be able to provide needed information to the FBI. The FBI refused these offers.

What is the policy of the Justice Department in terms of cooperating with local officials outside of the law enforcement community who may have information that would be helpful to terrorism investigations?

The Honorable John N. Hostettler

28. In his report on 9/11 detainees, the IG explains that after September 11, the Justice Department was concerned about the possibility of additional sleeper cell attacks and that the FBI immediately sought to shut down any "sleeper" cells of terrorists who might be preparing another wave of violence.

a. Is this an accurate description of the Justice Department and FBI's focus following the September 11 attacks?

b. Isn't it the Department of Justice's duty to use all legal tools, including the Immigration and Nationality Act, to protect the American people from those who would come to our country with malevolent intentions?

29. The IG's report on 9/11 detainees quotes you as stating that even though some of the 9/11 detainees may have wanted to be released or may have been willing to leave the country, it was in the national interest to find out more about them before permitting them to leave.

a. What risk would it pose to the United States if our government were to allow a potential terrorist to leave our country without investigating the alien's possible ties to terrorism?

b. What risks would it pose to our relations with another country if we were to return a possible terrorist to that country without investigating the alien's terrorist ties and informing the home country of our government's findings?

30. a. Do illegal aliens in the United States have an automatic right to release on bond during removal proceedings, or is release on bond a discretionary determination made in all cases

by an appropriate officer after assessing whether the alien poses a risk to the national security?

b. Wouldn't it have been irresponsible for the INS or Justice Department to release an alien who the FBI has reason to believe is connected to the September 11 attacks specifically or to terrorism generally?

31. According to the Inspector General's report on September 11 detainees, there were 762 special interest detainees, of which 515 were deported after being "cleared" by the FBI. What does the word "cleared" mean? Is it true that an alien can be "cleared" for removal but still have connections to terrorism?

The Honorable Linda Sanchez

32. When Congress voted on the USA PATRIOT Act, it did so at the strong insistence of the DOJ that these new authorities were necessary in order to fight terrorism. It was further urged that the bill be enacted quickly so that we could get that fight underway. However, it is now clear that many of those new authorities are unnecessary in that regard. Now that we have had more time to look at the effectiveness of these authorities, we can see that some of them were improperly enacted. We can carefully review each new authority and determine which ones, if any, will actually be useful in fighting a war on terrorism. What steps are you planning to take to get this process going and to ensure that it is completed properly and in a timely manner?

33. The OIG report contains horrifying examples of mistreatment of detainees, including the taunting of detainees by calling them "Bin Laden junior" and telling them "you're going to die here," "someone thinks you have something to do with [9/11] so don't expect to be treated well." The detainees were physically abused as well- an inmate with a broken arm and injured finger had his wrist and finger twisted by officers, another was thrown in his cell naked without a blanket. They were deprived medical attention for injuries sustained in those assaults because, in the words of one physician's assistant, they "were not entitled to the same medical or dental care as convicted federal inmates." Your spokesperson said the Department makes "no apologies" for this conduct. Do you stand by her statement?

34. Section 236A of the Immigration and Nationality Act makes an individual subject to mandatory detention as a person whom the Attorney General has reasonable grounds to believe is linked to terrorist activity, among other endangering activity. Custody under 236A requires "certification." Page 28 of the OIG report states that "as of March 26, 2003, no alien had been certified by the Attorney General under these provisions." Why were none of the 762 individuals certified under these provisions for custody?

35. What do you propose as a system for the Bureau of Prisons to report to the Department its policies and practices with respect to its treatment of immigration detainees?

36. It is now some 20 months since the government arrested and detained over 1000 immigrants in the wake of 9/11. Nevertheless, the names of those detained are still being withheld. The main justification for this massive refusal to release information is that doing so will provide a "road map" to al Qaeda and other terrorist groups as to the investigations. However, in the program to interview Muslims, in the special registration program, in the absconders program, in the asylum program, it is clear that the focus was on Muslim men from certain countries. In light of that, why is it necessary to withhold the names of the detainees? It is said that there are national security reasons to withhold some of the names, but it should be possible to release the rest of the names.

DEPARTMENT OF JUSTICE RESPONSES TO QUESTIONS FOR THE RECORD CONCERNING THE USA PATRIOT ACT (P.L. 107-56)

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

JUNE 5, 2003

1. **The Department had previously advised this Committee that the FBI and the Department were taking additional steps to improve the efficiency of the Foreign Intelligence Surveillance Act (FISA) process. One of these steps was the creation of a FISA unit in November 2002, at FBI Headquarters that was charged with instituting an automated tracking system that would electronically connect the field divisions, FBI Headquarters, the FBI's National Security Law Unit, and the Office of Intelligence Policy Review (OIPR).**

   A. **What is the status of this automated tracking system?**

Answer: The FBI's automated tracking system, called the Foreign Intelligence Surveillance Act Management System (FISAMS), is being developed under a contract let in early 2003. Work began in February 2003 with a goal of having a pilot system available for testing in July 2003 and an Initial Operating Capability in October 2003.

The prototype system was fielded and tested by users in the field offices and at FBI Headquarters in July 2003 using test data sets. Feedback was used to modify the system and guide further development.

In October 2003, the contractor delivered Version 1.0 of the system for certification and accreditation testing by the Security Division. The FISAMS application was approved in November but the FBI's Information Resources Division (IRD) encountered a problem with portions of the operating system supporting the FISAMS, requiring testing of updated operating system software to correct this problem. IRD is working to provide to DOJ's Office of Intelligence Policy Review connectivity to the FBI production environment. Once these tasks are completed and the FISAMS is available on the production servers, the Security Division will issue approval to operate and the Foreign Intelligence Surveillance Act (FISA) Unit can begin to load the organizational structures and users into the system so actual operational use of the production system can begin.

During December 2003, the FISA Unit, Office of the General Counsel, FBI, conducted user training for FBI Headquarters and the Washington Field Office. Training for other field offices will take place starting in January 2004.

In addition, the contractor is developing Version 2.0 of the system, which will provide additional user features and an enhanced database. IRD is hiring two Information Technology Specialists who will be dedicated to further development of the system in the coming years. In the future, the FBI plans to explore the use of electronic signatures for documents, electronic filing with the Foreign Intelligence Surveillance Court (FISC), and electronic distribution of court orders to common carriers and service providers.

B. What are the other duties of the FISA unit?

Answer: The FISA Unit performs the administrative support functions for the FISA process. In addition to FISA processing and tracking, which will be handled by the FISAMS, the FISA Unit is responsible for distribution of all FISC orders and warrants to the appropriate field divisions for their use and for service upon telecommunications carriers, Internet service providers, and other specified persons.

C. Has operational efficiency improved since the Unit was created?

Answer: Yes. The FISA Unit, the Office of Intelligence Policy and Review (OIPR), and the Foreign Intelligence Surveillance Court (FISC) have all taken steps to improve the distribution of orders and warrants after the court approves them.

At the direction of the Presiding Judge of the FISC, the Clerk of the Court changed the post-court processing of dockets. The Clerk of the Court now targets return of signed dockets to OIPR by close of business the next business day after approval. Previously, dockets could take up to a week or more to be returned to OIPR and the FBI.

OIPR has designated one employee as the Docket Clerk. The Docket Clerk is the only employee who is authorized to pick up signed dockets from the Clerk of the Court. This has given the Clerk of the Court a single point of contact for delivery of dockets and has helped ensure that all dockets are processed expeditiously upon receipt. Previously, dockets were returned to a number of attorneys and staff at OIPR and the FBI which led to inconsistent processing and distribution.

The FISA Unit has begun machine scanning primary and secondary orders and warrants upon receipt and e-mailing the resulting files to field office case agents for their use and to personnel in the various field offices for service of the secondary orders upon carriers, service providers, and other specified persons. We have found that most carriers and service providers will accept a printed copy of the signed, scanned document to renew coverage on an existing target. The conformed copies of the orders and warrants, with the raised seals, are subsequently sent for follow-up service and service to establish initial coverage on targets. Previously, machine copies of orders and warrants were made and communications prepared for distribution. This process often took up to two weeks.

These changes together have resulted in having a serviceable copy of a signed order in the hands of a carrier or service provider in a matter of two or three days rather than two or three weeks.

D. What other steps have been implemented to achieve optimum efficiency in the FISA application process?

Answer: Effective March 1, 2003, field offices began using a standard "FISA Request Form" to request initiation, renewal and modification of FISA coverage. This single, standard form replaced a variety of communications used in the past to request coverage. The form helps ensure that the drafters of the FISA packages receive all pertinent information required without additional, unnecessary administrative details, which facilitates quicker drafting.

Also effective March 1, 2003, field offices began sending requests to renew and amend existing FISAs directly to OIPR. Previously, all requests to renew or amend existing FISAs had to come through FBIHQ for approval prior to being sent to OIPR for drafting.

2. Section 326 of the USA PATRIOT ACT requires financial institutions to implement reasonable procedures to verify the identity of any person seeking to open a bank account. The Treasury Department has promulgated regulations that would permit these institutions to accept identification cards issued by embassies and consulates of foreign governments, which can be susceptible to fraud. What is the DOJ's position on the Treasury Department's implementation of section 326 of the USA PATRIOT Act?

Answer: On July 1, 2003, the Treasury Department issued a Notice of Inquiry regarding implementation of, and possible changes to, regulations promulgated pursuant to section 326 of the USA PATRIOT Act. On July 31, 2003, the Justice Department submitted comments to the Treasury Department regarding its Notice of Inquiry. Copies of those comments are enclosed. On September 25, 2003, the Treasury terminated its Notice of Inquiry and did not adopt the changes suggested by the Department of Justice.

3. Has the United States Department of Justice offered any classified evidence in immigration proceedings that have been instituted since September 11, 2001?

Answer: The Department of Justice has not offered classified evidence in any immigration proceeding initiated between September 11, 2001, and March 1, 2003, when responsibility to bring charges and present evidence in immigration proceedings transferred to the Department of Homeland Security.

4. **In May 2003, the Justice Department published an interim regulation that provided a mechanism for the government to ask an immigration judge to place a "protective order" upon information that, while not classified, was sensitive and could damage law enforcement or national security interests if released beyond parties to a specific immigration case.**

   a. **What are the government's concerns that prompted it to authorize protective orders in immigration cases?**

   b. **Is this "protective order" mechanism the Justice Department's alternative to closed hearings?**

Answer: In promulgating the protective order rule, 28 CFR 1003.46, the Department of Justice was concerned that it would be necessary to present sensitive, non-classified law enforcement or intelligence documents to an immigration judge for consideration in removal proceedings. The rules of procedure before immigration judges at that time did not include any provision for protective orders, such as has long been the case with the Federal Rules of Civil Procedure. *See* F.R.Civ. P. Rule 26(c).

The protective order rule authorizes immigration judges to issue protective orders and accept documents under seal. This authority ensures that sensitive law enforcement or national security information can be protected from broad public dissemination, while still affording full use of the information by immigration judges, the Board of Immigration Appeals (BIA), respondents, the Department of Homeland Security (DHS), and reviewing courts. The rule sets out procedures for the DHS to seek protective orders and to appeal the denial of such requests. This rule also provides for sanctions for violations of protective orders. The rule applies in all immigration proceedings before the immigration judges and the BIA.

Protective orders are a complement to possible closed hearings. As a general proposition, the protective order under 8 CFR 1003.46 limits the dissemination of sensitive, unclassified law enforcement or intelligence documentary evidence or knowledged gained from that documentary evidence. Closure of a hearing – as is common in cases involving arriving aliens, abused spouses, and asylum seekers under 8 CFR 1003.27 and 1240.10 – is intended to protect the testimony of specific individuals. Of course, a protective order that will be discussed during a hearing necessitates that the hearing be closed.

   c. **In how many cases have protective orders been requested? Have any protective orders been granted?**

Answer: Protective orders under 8 C.F.R. 1003.46 have been requested 14 times. Thirteen orders have been issued.

d. If a protective order is granted, do the alien and the alien's counsel get access to the protected information?

Answer: Subject to the terms of the order, the respondent and respondent's counsel may receive the evidence that is the subject of the order.

e. Can the alien challenge the admissibility of the evidence that is protected by such an order?

Answer: A protective order does not alter the evidentiary standards that are applicable to the document being protected, and a respondent may challenge the admissibility of that evidence.

f. Do Federal court judges have a similar ability to issue protective orders to prevent the dissemination of information introduced in Federal court?

Answer: The United States District Courts use similar procedures under Federal Rule of Civil Procedure No. 26(c).

g. Can a government attorney be sanctioned for disclosing information in violation of an immigration judge's protective order?

Answer: Yes. An attorney for the government may be sanctioned for violating an immigration judge's protective order.

5. Section 411 of the USA PATRIOT Act amended the Immigration and Nationality Act to broaden the scope of aliens ineligible for admission or deportable due to terrorist activities. In its May 13, 2003 response to Committee questions on USA PATRIOT Act implementation, the Department stated that: "Prior to the transfer of the INS to DHS, the INS had not relied upon the definitions in section 411 to file new charges against aliens in removal proceedings."

a. Does this mean that the Justice Department has not concluded that any of the aliens with whom it has dealt since the passage of the USA PATRIOT Act in October 2001 were terrorists? If not, why weren't these aliens charged under these provisions?

Answer: The fact that an illegal alien was prosecuted for non-terrorist crimes or deported based on non-terrorism-related grounds of removal rather than prosecuted, does not mean that the alien had no knowledge of or connection to terrorism. For example, one immigration detainee who pled guilty to the non-terrorism-specific crimes of conspiracy to commit identification fraud and aiding and abetting the

unlawful production of identification documents traveled overnight with two of the hijackers. Often in terrorism-related cases, an individual is deported or criminally charged on grounds seemingly unrelated to terrorism because the assertion of specific terrorism charges can compromise sensitive intelligence matters such as the sources and methods used to gather information.

In addition, in immigration proceedings, as opposed to the criminal context, the government is seeking only one remedy, removal. Therefore, the Department believes that the best use of resources is to seek removal of an alien based on the charge that is most likely to prevail and simplest to prove, such as a violation for overstaying one's authorized period of admission to the United States. Bringing terrorism-related grounds of removal against an alien can raise issues such as the use of classified information as well as the expectation that terrorism-related charges are more likely to bring federal court challenges which ultimately delay the removal of the alien and cost the American taxpayers money. In addition, in the immigration context, aliens in removal proceedings may utilize the fact that they have been charged with a terrorism-related ground of removal as a basis for an asylum claim, further delaying their successful deportation.

b. Have any aliens been charged with any terrorism-based ground of removal since September 11, 2001? If so, are these the only aliens with terrorist ties who have come to the attention of the Justice Department since September 11, 2001?

Answer: According to the records of the Executive Office for Immigration Review, four aliens were charged with terrorism-based grounds of removal between September 11, 2001, and March 1, 2003, when responsibility for bringing charges against an alien in immigration proceedings was transferred to the Department of Homeland Security. No alien who had been investigated in connection with the events of September 11th, and who had been placed in an immigration proceeding, was charged with terrorism-based grounds of removal or inadmissibility. We respectfully refer you to the Department of Homeland Security if you require further information in this connection.

c. Are there reasons that the Justice Department or INS would not have charged an alien believed to have a connection to a terrorist group or terrorist acts with a terrorism-related ground of removal? If so, why?

Answer: Please see response to 5(a), above.

d. How many aliens have been charged on terrorism-related criminal grounds since September 11, 2001? Are these the only aliens whom the Justice Department believes are related to terrorism?

Answer: Since September 11, 2001, six aliens have been charged with terrorism-related criminal grounds in connection with the PENTBOMB investigation. Similar to the response to questions (a) and

(c) above, there may be many reasons why the Department has not brought criminal charges against individuals whom we believe to be connected to terrorism. For example, the information we possess may not relate to a specific criminal violation under U.S. law, or the information may be classified and cannot be declassified. In addition, the burden of proof is higher for criminal cases, and the information that we possess may not be sufficient to prove guilt beyond a reasonable doubt.

e. Are there any reasons why the Justice Department would deport an alien who is suspected of terrorist ties or of engaging in terrorist activities rather than charging the alien criminally? Why would the Justice Department do this? Has the Justice Department done this?

Answer: In some cases, the FBI and other law enforcement agencies were able to determine that aliens detained in connection with the September 11th investigation were no longer of investigatory interest and those individuals were subsequently released or deported. In other cases, while there may have been information linking an individual to criminal or terrorist activity, the information was not substantial enough to prosecute and all indications were that no further substantive information would surface. In those cases, in the interest of national security, it was determined that the best course of action was to proceed with deportation and remove a potentially dangerous person from our borders based upon an immigration violation rather than release the individual into American society. The Department believes that it is best advised to use all legal tools at our disposal to detain, investigate and prosecute violations of our nation's laws and ensure that any threats to the American people are neutralized, whether it be through detention or removal.

6. The Department of Justice took a major step in tightening border security after September 11 by implementing the National Security Entry-Exit Registration System (or NSEERS), which required aliens to be fingerprinted, photographed and registered, both at the ports of entry and domestically. While control over this initiative passed to the Department of Homeland Security, what results do we have to show for this effort? Have any aliens linked to terrorism been identified through NSEERS? If so, how many? And have any criminal aliens been arrested through NSEERS?

Answer: On June 13, 2002, the Department published a proposed rule to modify the regulations to require certain nonimmigrant aliens to make specific reports to the Immigration and Naturalization Service: upon arrival; approximately 30 days after arrival; every twelve months after arrival; upon certain events, such as a change of address, employment, or school; and at the time they leave the United States. 67 FR 40581. The Department adopted a final rule on August 12, 2002. 67 FR 52584. This program was known as the National Security Entry - Exit Registration System. This system, along with other functions of the former Immigration and Naturalization Service, transferred to the Department of Homeland Security on March 1, 2003, pursuant to the Homeland Security Act of 2002.

The Attorney General established NSEERS both as a direct means of protecting the United States from terrorism and to implement Congress' demands for a complete entry-exit management system. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, § 110, Pub. L. No. 104-208, 110 Stat. 3009-558 (Sept. 30, 1996); Immigration and Naturalization Service Data Management Improvement Act of 2000, § 3, Pub. L. 106-215, 114 Stat. 337 (June 15, 2000); United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, tit. IV, subtit. B, § 414(b), Pub. L. 107-56, 115 Stat. 272, 353-354 (Oct. 26, 2001); Enhanced Border Security and Visa Entry Reform Act of 2002, tit. III, §302, Pub. L. 107-173, 116 Stat. 543, 552 (May 14, 2002).

In the brief period before the program transferred to the Department of Homeland Security, the Department found that over 3,000 aliens encountered through NSEERS were in violation of the Immigration and Nationality Act and warranted removal, and 28 aliens were the subjects of outstanding federal or state criminal arrest warrants. As of June 3, 2003, NSEERS had led to the identification of 11 suspected terrorists. In addition, INS/DHS had apprehended or denied admission at ports of entry to 766 aliens who presented law enforcement threats due to felony warrants or prior criminal or immigration violations, rendering them inadmissible. Moreover, the domestic registration of persons already in the United States enabled immigration officials to apprehend 136 felons who were in the country illegally. These included criminals guilty of homicide, aggravated assault against a law enforcement officer, sexual battery, assault with a deadly weapon, and cocaine trafficking.

The Department of Homeland Security has continued to implement the comprehensive entry-exit program begun by the Attorney General in NSEERS through the US VISIT program. With the US VISIT program beginning to stand up, it has been possible for the Department of Homeland Security to scale back specific requirements of the NSEERS program. We recommend that the Committee contact the Department of Homeland Security for more detailed and up-to-date information.

7. How does the Civil Rights Division and the U. S. Attorney's office coordinate with local prosecutors in instances where civil rights cases are being prosecuted locally?

Answer: As a general proposition, where state or local prosecutors are proceeding with a potential criminal civil rights case, we monitor the state and local effort. At the conclusion of the state court prosecution, we review the evidence, including the local police reports and any state court transcripts, to determine if federal interests have been vindicated by the state prosecution. In short, we work with State and local prosecutors to coordinate our investigations and charging decisions and to ensure that resources are expended wisely.

8. It is widely acknowledged that our nation's critical infrastructure is vulnerable to terrorist attacks. While we work to secure our airports, highways, and power plants, we must also ensure cyberspace is protected.

a. Are we prepared to deal with the possibility of a cyber attack?

Answer: The FBI is in a position to address the possibility of a cyber attack. We work closely with the Intelligence Community, Law Enforcement Agencies, other government agencies, and the private sector to collect intelligence and investigate computer intrusion matters, also known as cyber attacks. The FBI is the lead agency for these investigations when terrorists or nation-states are responsible for the intrusions. The Cyber Division is working closely with the House and Senate Appropriations Committees to ensure that the transfer of Cyber Division assets to the Department of Homeland Security does not impact on our ability to address computer intrusions. The FBI has launched an extensive recruiting effort to ensure that we have properly trained investigators working on these cases.

In addition, the FBI has regional squads across the country whose sole mission is to collect intelligence and investigate computer intrusion matters. In FY 2003, the FBI funded the creation of approximately 45 task force operations which will also investigate computer intrusion matters as part of their overall investigative responsibilities.

The FBI no longer includes the National Infrastructure Protection Center (NIPC), whose mission was to provide "a national focal point for gathering information on threats to the infrastructures" and to provide "the principal means of facilitating and coordinating the Federal Government's response to an incident, mitigating attacks, investigating threats and monitoring reconstitution efforts." The functions of the NIPC, excluding computer intrusion investigations, were transferred to the Department of Homeland Security by Pub. L. No. 107-296 (November 25, 2002).

b. Have you increased the level of prosecution for cyber crimes? If not, why? If so, can you quantify any decrease in the amount of cyber crime committed against interests in the United States?

Answer: The Department has moved aggressively to increase the number of computer crime cases prosecuted. As a result of increased Congressional funding over the past several years, the Department has added additional prosecutors focused on computer hacking and intellectual property crimes to eleven United States Attorneys' Offices around the country in regions with dense high-tech industry. Similarly, the Computer Crime and Intellectual Property Section in the Department's Criminal Division has added more prosecutors and has sought to bring more prosecutions in addition to its traditional role of supporting computer crime prosecutors in the field. For more information about recent computer crime prosecutions across the country, see http://www.cybercrime.gov/cccases.html.

Despite these increases, however, it is very difficult to correlate our prosecutorial efforts with the amount of computer crime that occurs in the United States. This difficulty results from two factors: (a) as the use of the Internet and society's dependence on computer networks continues to rise, these networks become increasingly attractive targets for criminals and terrorists; and (b) there has been a lack of comprehensive, reliable data from which to detect trends. Regarding the latter factor, investigation and prosecution of computer intrusions have historically suffered from low levels of victim reporting, and to date, there have been few comprehensive studies of the amount of computer crime. Last year, however, the Bureau of Justice Statistics began a project to compile comprehensive and reliable statistics in order to understand the nature and scope of the threat of computer crime and better assess the impact of the Department's prosecutorial efforts.

9. Press reports indicate that there may be a disagreement, or at the least, a debate within the government as how to proceed with the prosecution of Zacarias Moussaoui, now awaiting trial in federal court in the Eastern District of Virginia. The prosecution seems to be subject to an inordinate delay and it appears that the federal judge presiding in that case has questioned whether a federal criminal court is the appropriate forum. The *Washington Post* has characterized recently released court documents as revealing "a government and court system uncertain how to proceed against Moussaoui in a civilian court while trying to conduct an international war on terrorism and maintain national security." The judge reportedly has indicated that the Department of Justice's decision to try Mr. Moussaoui in a federal criminal court carried with it legal consequences and responsibilities.

a. Were the legal consequences and responsibilities of trying this matter in a federal criminal court contemplated?

Answer: Yes. The Department was well aware of its responsibilities under the Constitution, the law and the rules of procedure to ensure that justice is done, classified information is protected, and the defendant receives a fair, public, and speedy trial. The Department has honored those responsibilities and will continue to do so.

b. Are you satisfied that a civilian court, and that one located in the Eastern District of Virginia, is the appropriate place to prosecute Mr. Moussaoui and, if so, are you satisfied with the progress of that case?

Answer: Yes, we are satisfied that a civilian court, and especially the one located in the Eastern District of Virginia, is the appropriate place to prosecute Mr. Moussaoui. The Eastern District of Virginia is well-known for its efficient handling of criminal cases, and the Department has been satisfied with the progress of this extremely complex case to date. The Department suggested an early trial date

and has done all it can, consistent with the need to protect classified national security information, to bring the case to trial as soon as possible.

c. If that prosecution continues, can you predict when an actual trial is likely to begin or do you foresee continuing pre-trial motions, rulings and appeals which will further delay the matter?

Answer: As you know, the government is currently appealing a critical national security issue regarding the district court's orders directing the government to allow Moussaoui to depose certain enemy combatants abroad. We hope to prevail in that appeal, which was argued before the Fourth Circuit on December 3, 2003, by Deputy Solicitor General Paul Clement. The case was taken under advisement, and a decision is expected in the near future. At this point it is not possible to predict whether defense counsel will file motions or the district court issue additional rulings that might necessitate the government taking an additional appeal to protect national security or other critical government interests, or whether the defense might attempt an appeal. We have and will continue to work to bring the case expeditiously to trial, and we have confidence the trial court will manage it toward that end. For example, in response to a motion from defense counsel for guidance on the setting of a trial date, the district court issued an order on November 5, 2003, in which, in addition to staying all proceedings in the trial court pending the appeal, the court ruled that no trial date will be set sooner than 180 days after return of the mandate, if the case remains a capital prosecution, or 90 days after the return of the mandate, if the sanctions imposed by the district court (and subject of the appeal) are upheld (i.e., if the case is not a capital prosecution). The district court also issued an order on November 14, 2003, vacating its prior decision allowing Moussaoui to represent himself. The defendant is now represented by able counsel, which should lead to more efficient progress of the case.

10. During the 107th Congress, the House of Representatives passed the Federal Agency Protection of Privacy Act (FAPPA) requiring federal agencies to include a privacy impact analysis to be commented upon by the public when issuing regulations.

a. In a time when the threat of terrorism has caused the government to take unprecedented actions that understandably impact upon traditional spheres of personal privacy, would it not allay many citizen concerns about government intrusion and overreaching if new regulations were drafted with an articulated consideration of those citizen concerns?

b. Can we anticipate the support of the Department of Justice for legislation, such as FAPPA, which follows a reasonable approach and takes moderate steps to insure federal regulations consider legitimate privacy concerns?

Answer: We are studying the issues raised by this proposed legislation; however, we are unable to provide a position at this time. We are committed however, to acting "reasonably" to insure that federal regulations take into account legitimate privacy concerns.

11. Does the Justice Department, any agent of the Department, or contractor on behalf of the Department investigate or maintain files on people who are not legitimate suspects of crime or terrorism?

Answer: Yes. The Department of Justice maintains a variety of investigative and background files on individuals who are not currently "legitimate suspects of crime or terrorism." Examples of such persons or entities would include: employees of the Department or applicants for employment (e.g., the results of background checks); contractors and bidders; grant applicants and recipients; material witnesses; civil litigants; foreign agents; persons entered into the National Crime Information Center; and others, consistent with the Department's lawful responsibilities. This list is not intended to be exclusive.

12. You may recall that I asked you during the June 5th hearing to comment on whether you were aware of any data-mining efforts by any component within the Justice Department that collects information on individuals other than criminal suspects. As a follow-up to that query, I mentioned that I may want you to respond in writing.

a. Accordingly, would you please provide your written response?

Answer: As noted in our answer to question 11, consistent with the Department's lawful mission, we regularly collect and maintain files and information on a variety of persons who are not the suspects of crime or terrorism. "Data mining" -- the collection of related information from electronic sources -- is performed in connection with legitimate, lawful activities of the Department. For example, it would not be uncommon for a person who applies for employment with the Department, and who is otherwise a public figure, to be the subject of a "Google" search on the Internet in the course of the mandatory background investigation.

b. In addition, are you aware of any agent of the Department or contractor on behalf of the Department that collects information on individuals other than criminal suspects?

Answer: See the response to question 11.

c. Does the Department investigate or maintain files on people who are not legitimate suspects of crime or terrorism?

Answer: See the response to question 11.

13. What were the data sources used to identify the detainees rounded up following the September 11, 2001 attacks?

Answer: Immediately following the September 11, 2001, attacks, the FBI received leads from various sources, including telephone calls from concerned individuals to FBI field offices, information from other agencies, tips from our established sources and assets, calls to our 1-800 hotline numbers, and information obtained through our full and preliminary investigations. In following these leads, if FBI Agents or other JTTF members discovered that subjects were "out of status," the INS was notified so that they could pursue arrest or other appropriate action based on this immigration status.

14. On May 31, a *Philadelphia Inquirer* editorial made the following observations:

Why, for instance, have so many criminal cases been mislabeled as instances of international terrorism? As Inquirer staff writer Mark Fazlollah has documented, dozens and dozens of people charged in such cases have proven to be unconnected to terror groups. Could someone be trying to hype the antiterrorism benefits of the new powers to build a case to extend them even further?

In New Jersey, federal prosecutors recently pulled 65 Middle Eastern students' cases from terrorism lists. They said the students' hiring of stand-ins to take English exams for college was not terrorism-related.

What is your response?

Answer: The allegation that the Department is intentionally mislabeling numerous terrorism-related matters is not accurate. The information cited in this editorial appears to be based on a January 2003 report by the General Accounting Office (GAO) that cited 288 terrorism-related cases as being "misclassified". The problem cited by the GAO report was caused not by intentional mislabeling, but by transition issues resulting from a change in how anti-terrorism cases were categorized prior to September 11th and how they are subsequently categorized after September 11th. The "misclassifications" were the result of late notice to the United States Attorneys' Offices of Terrorism and Anti-Terrorism code changes and insufficient time for offices to make the changes prior to the GAO report. The GAO report acknowledged the fact that 127 of the "misclassified" cases fell under new anti-terrorism case categories and that only five of the 288 cases the GAO cited, or less than two percent, were unrelated to terrorism or our anti-terrorism efforts.

These classification codes were revised and supplemented after September 11th to properly capture the types of prosecutions being used to fight terrorism. Prior to September 11th, the Executive Office for United States Attorneys (EOUSA) had only two terrorism-related case classification codes --

International Terrorism and Domestic Terrorism. Reflecting the new reality after September 11th, EOUSA first added a case classification code for Terrorism-Related Hoaxes, then later added a code for Terrorist Financing and several codes for Anti-Terrorism (such as Identify Theft, Immigration, and Violent Crime) to capture activity intended to prevent or disrupt potential or actual terrorist threats where the offense conduct would not fall within one of the already-existing codes.

Under the new codes, the broad range of prosecutions used to disrupt activities that could facilitate or enable future terrorist acts and anti-terrorism cases are now able to be captured. While some of these illegal acts may prove to be for personal benefit, activities such as identity theft, and immigration violations may also be used to position individuals who plan to commit future acts of terrorism. So called "sleepers" are difficult to identify as they will seek to blend in with minimal illegal activity until they are activated.

To ensure that data on all anti-terrorism cases is captured and included in EOUSA statistics, EOUSA, working with the Department's Criminal Division, on August 7, 2002, sent a memorandum to all United States Attorneys directing that appropriate pending cases and appropriate cases closed in Fiscal Year 2002 be reclassified, if needed, to reflect the new case classification codes. Under this directive, all Terrorism/Anti-Terrorism cases in Fiscal Year 2002 should have been re-sorted according to the new codes. With the transition to a new coding scheme so close to the end of the fiscal year, some United States Attorneys' Offices either did not have time to, or did not fully understand the need to, reclassify already closed cases.

EOUSA has and will continue to take every reasonable step to ensure that proper reclassification is completed and that future data entries are complete and accurate. A process exists for the review of United States Attorney case management system data and EOUSA is working to continue to oversee and validate the accuracy of case classification and conviction data entered into the case tracking system by the various United States Attorneys' Offices. On April 9, 2003, EOUSA sent a directive to the United States Attorneys asking them to review all Terrorism and Anti-Terrorism matters and cases and ensure that the most appropriate Terrorism or Anti-Terrorism program category code is assigned. The United States Attorneys' Offices are required to perform this data quality review quarterly. This directive re-emphasized the critical role of the United States Attorneys in providing the Department with accurate and timely caseload data.

The Department is committed to accurate reporting and accountability for cases prosecuted in federal court. This reporting ensures, for example, that Congress is able to provide adequate oversight of the Department's activities, and ensure that the Department has adequate resources. To the extent that the GAO Report identified various weaknesses in the current system, the Department is committed to taking every reasonable step to ensure that proper reclassification is completed and that future data entries are complete and accurate.

Finally, the referenced cases in the District of New Jersey began as an investigation into a fraudulent scheme whereby people paid imposters to take the Test of English as a Foreign Language (TOEFL). During the course of the investigation, it was discovered that one of the test takers had in his possession material that caused the investigation to broaden. The investigation into possible terrorist activity was pursued vigorously and fortunately terrorist activity was not discovered. At the conclusion of the investigation, it would have been more appropriate for the cases to be coded under an Anti-Terrorism category.

15. What would be your reaction to legislation that required the Justice Department to provide the following information to Congress on an annual basis:

a. a public report on the total number of U.S. persons targeted for court orders under FISA and the number of persons targeted for electronic surveillance, physical searches, pen registers and business records; the names and identities of those targeted would not have to be revealed;

Answer: Public reports concerning investigative methods and techniques are problematic because they may provide information that assists subjects and potential subjects to evade investigative efforts by avoiding those vehicles that receive the greatest investigative attention and using those that receive the least. We believe that the FISA strikes an appropriate balance between public reporting and national security concerns by requiring full reporting, in a classified setting, to the Senate Select and House Permanent Select Committee on Intelligence on a semi-annual basis.

b. a public report on the number of times that information acquired through a FISA order is authorized for use by the Attorney General in criminal proceedings; and

Answer: The Department is required by the FISA, 50 U.S.C. § 1808, to submit a semiannual report to the House Permanent Select and the Senate Select Committees on Intelligence. These reports include information on the number of times that information acquired through a FISA order is authorized for use by the Attorney General in criminal proceedings. In addition, the Attorney General's authorization to use information obtained through a FISA order in civil or criminal litigation is frequently made public when the government gives notice of its intent to use that information in the litigation or when the information is introduced in court. Because this information is already subject to congressional oversight and is publicly disclosed on appropriate occasions, the Department would not support further public release of this information.

c. a report to the House and Senate Judiciary Committees on surveillance of public and university libraries?

Answer: As noted above, public reports may allow foreign terrorists and spies to modify behaviors to take advantage of lesser used investigative methods and techniques. In addition, a reported increase in the use of these techniques may alert foreign terrorists and spies to the likelihood of their surveillance, causing them to change their methods or locations to avoid future detection.

16. **I think that there are two ways to look at the Fourth Amendment of the Constitution from a law enforcement perspective. One view gives it an interpretation favoring efficiency over personal protection. In other words, giving law enforcement the benefit of the doubt. The other views it as an ideal embodying traditional preservation of individual privacy rights that mandates the inefficiency of search and seizure for the sake of maintaining those rights.**

Which view point is yours and how have you specifically implemented that philosophy within the Department?

Answer: First and foremost, the Fourth Amendment safeguards the privacy of the American people and the inviolability of their property, specifically protecting "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." We agree with the U.S. Supreme Court that the "touchstone of the Fourth Amendment is reasonableness." *United States v. Knights*, 534 U.S. 112, 118 (2001). Specifically, the reasonability of a search under the Fourth Amendment is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). The provision thus generally calls for balancing an individual's interest in privacy with the legitimate needs of law enforcement. The Department of Justice is sensitive to the fact that important factors weigh on both sides of this balance, and, in all of its law enforcement activities, the Department zealously attempts to conform its conduct to applicable Fourth Amendment jurisprudence.

17. **Terrorism Investigations and Use of Statutory Authority**

Prior to enactment of the USA PATRIOT Act, the evidentiary standard for a FISA order for business records was relevance and "specific and articulable facts" giving "reason to believe" that the person to whom the records related was an agent of a foreign power. The PATRIOT Act dropped the additional requirement that there be "specific and articulable facts giving reason to believe" that the person to whom the records related was an agent of a foreign power. So these records simply need to be relevant to a terrorism investigation.

a. Does this permit the Department to obtain the business records of a person who is not an agent of a foreign power but is the target of a terrorism investigation?

b. Does this also apply to a U.S. person who is the target of the investigation?

c. Does this also apply to an American citizen who is the target of the investigation?

d. Can the Department obtain the business records of a person who is not an agent of a foreign power nor the target of a terrorism investigation if it is determined that the records sought are relevant to such an investigation?

e. Does this also apply to a U.S. person who is not an agent of a foreign power nor the target of a terrorism investigation?

f. Does this also apply to an American citizen who is not an agent of a foreign power nor the target of a terrorism investigation?

Answer:

50 U.S.C. § 1861(a)(1) authorizes the FBI to seek a court order "requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." Such an investigation of a United States person may not be "conducted solely upon the basis of activities protected by the first amendment to the Constitution." Similarly, 50 U.S.C. § 1861(b)(2) requires that applications for the production of business records "specify that the records concerned are sought for an authorized investigation . . . to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities."

There is no requirement in § 1861 that the party upon whom the order is served be an agent of a foreign power or the target of an international terrorism investigation or an investigation to protect against clandestine intelligence activities, so long as the records sought are for an appropriate investigation. This is so regardless of whether the recipient of the order is a non-U.S. person, a U.S. person, or a U.S. citizen. Indeed, it will be the unusual case in which a § 1861 order is served on someone who is the subject of an investigation because doing so would obviously alert the subject to the existence of the investigation, something the FBI is generally unlikely to desire.

The more likely scenario is that § 1861 orders will be directed at third parties who are in possession of documents that are relevant to the investigation of someone else. For example, if the FBI is seeking

employment records regarding a suspected terrorist, the § 1861 order will be served upon the employer of the suspected terrorist, not the suspected terrorist himself. The order would be served on the employer (who is not an agent of a foreign power nor the subject of an investigation) and would seek records belonging to the employer that are about the suspected terrorist, but would not be records that belong to the suspect. A similar example would be hotel records that contain information about a visit by a suspected terrorist. The records belong to the hotel, not the suspect, and the hotel is unlikely to be an agent of a foreign power or a suspect of the investigation.

In addition, there may be circumstances in which the FBI seeks records pertaining to an individual who is neither an agent of a foreign power nor the subject of an appropriate investigation where the information nevertheless is for an ongoing investigation. For example, if there is reliable information that one or more terrorists whose identities are unknown are traveling on a particular flight on Acme Airlines, a § 1861 order served on Acme Airlines for a list of all passengers on the flight would be appropriate, even though many individuals on the flight undoubtedly are innocent.

In reviewing the examples set forth above, it is important to remember that such information has, for many years, been available to the Government through Federal grand jury subpoenas without prior judicial review. By contrast, § 1861 requires prior court approval before the Government can obtain such records.

1. **During your testimony, there was some confusion about the scope of Section 215 of the USA PATRIOT Act. Please clarify which types of records could be obtained under Section 215.**

   a. **Does that include:**

      Book purchase records?
      Library records of materials checked out?
      Computer records?
      Medical records?
      Pharmaceutical records?
      Educational records?
      Firearm purchase records?
      Membership lists from a club or association?
      Membership lists from a religious institution?
      Membership information (e.g. payments, services used, etc...)?
      Tax records held by a tax preparer?
      Political contributions?
      Genetic information?

b. Has the Department used Section 215 authority to obtain:

Library records of materials checked out?
Computer records?
Medical records?
Pharmaceutical records?
Educational records?
Firearm purchase records?
Membership lists from a club or association?
Membership lists from a religious institution?
Membership information (e.g. payments, services used, etc...)?
Tax records held by a tax preparer?
Political contributions?
Genetic information?

c. Could the Department request an entire database of a business, association, religious institution or library under Section 215?

Answer: Section 215 of the USA PATRIOT Act allows the FISC, in terrorism and other national-security investigations, to order the production of business records - similar to the way that grand juries may subpoena the same sorts of records in investigations of ordinary crimes. Under section 215, the FISC is authorized to issue an order requiring the production of "any tangible things." 50 U.S.C. § 1861(a)(1). This language is identical to Fed. R. Civ. P. 34(a), which allows parties during discovery to demand the production of "any tangible things" in the possession of another party. In fact, section 215 contains a number of unique safeguards and limitations that have no counterpart in the grand jury context. For instance, section 215 requires that a federal court explicitly order the production of business records; by contrast, a grand-jury subpoena typically is issued without any prior judicial review or approval. Additionally, in investigations of U.S. persons, section 215 can be used only to protect against international terrorism or clandestine intelligence activities; a grand jury can obtain business records in investigations of *any* federal crimes. Further, section 215 expressly protects First Amendment rights; the grand-jury authorities contain no such protections. The section 215 order must also be consistent with other provisions of Federal law.

The Department of Justice is required every six months to "fully inform" Congress "concerning all requests for the production of tangible things under section 1861 of this title." 50 U.S.C. § 1862(a). The most recent report was delivered to the House Permanent Select and the Senate Select Committees on Intelligence and the House and Senate Committees on the Judiciary on January 5, 2004. On September 18, 2003, the Attorney General declassified the number of times to date the Department of Justice, including the Federal Bureau of Investigation (FBI), had utilized Section 215 of the USA PATRIOT Act relating to the production of business records. At that time, the number of times Section 215 was used was zero.

19. In his July 26, 2002 letter to the Judiciary Committee, then-Assistant Attorney General Daniel J. Bryant stated, in regard to Section 215, that "Under the old language, the FISA Court would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and "specific and articulable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. The PATRIOT Act changed the standard to simple relevance" (emphasis added). On numerous occasions in statements to the news media, DOJ spokespersons have stated that in order to examine someone's library records or book purchase records they must be an agent of a foreign power. As recently as May 22, 2003, the Associated Press reported that according to DOJ spokesman Jorge Martinez "the law only gives agents the power to research the library habits of 'agents of a foreign power' and won't be used to investigate 'garden-variety crimes'..."We're not going after the average American, we're just going after the bad guy."---"Library Privacy; Librarians find ways around USA PATRIOT Act" by Allison Schlesinger of the Associated Press. DOJ spokesman Mark Corallo was quoted in the *Bangor Daily News* on April 4, 2003 saying that critics of Section 215 were "misleading the public" and that "the fact is the FBI can't get your records." It appears these statements are not true.

a. Why are your spokespersons providing conflicting information about this law?

b. What steps are you and the Department taking to ensure that accurate information is disseminated to our citizens?

Answer: We regret any confusion that has arisen in this area. As Assistant Attorney General Bryant's letter of July 26, 2002, to the Judiciary Committee noted, under section 215 of the USA PATRIOT Act, the standard for issuance of a FISA order was changed from "'specific and articulable facts' giving reason to believe that the person to whom the records related was an agent of a foreign power," to a simpler "relevance" test. For additional information regarding the nature of the information required to obtain a FISA order under the USA PATRIOT Act, please refer to the answers to question 17.

The Department's efforts have been directed at correcting the inaccurate and misleading statements about section 215 of the USA PATRIOT Act – including the erroneous claim that the FBI can gain access to business records without a court order. Under section 215, the FBI cannot unilaterally get business records (including library records). Rather, this authority allows the Justice Department to seek such records only pursuant to an order issued by the FISC. Such orders are available only in a narrow set of investigations: (1) to obtain foreign-intelligence information about people who are neither American citizens nor lawful permanent residents; or (2) to defend the United States against spies or international terrorists. Section 215 cannot be used to investigate garden-variety crimes, or even domestic terrorism.

20. Section 215 does not allow an investigation of a U.S. person if such an investigation is conducted "solely upon the basis of activities protected by the First Amendment to the Constitution."

a. Would this limitation still allow an investigation based in part on activities protected by the First Amendment?

Answer: Under Executive Order 12333, the FBI is one of the government agencies that is authorized to conduct investigations to collect "accurate and timely information about the capabilities, intentions and activities of foreign powers, organizations, or persons and their agents" for the purpose of the "acquisition of significant foreign intelligence, as well as the detection and countering of international terrorist activities and espionage conducted by foreign powers." E.O. 12333, parts 2.1 and 2.2. All agencies covered by E.O. 12333 are to conduct their activities, including investigations, in a manner that "achieves the proper balance between the acquisition of essential information and protecting of individual interests." E.O. 12333, part 2.2. These provisions anticipate that many investigations identify a variety of activities undertaken by the target of the investigation that may include some activity deemed protected by the First Amendment, such as the identities of the persons or institutions with whom the target has associated or where the target has traveled. These facts could be part of the entire set of facts and circumstances taken into consideration in determining whether an investigation is warranted for the purpose of acquiring significant foreign intelligence, or detecting and countering international terrorist activities or espionage.

b. What definition of "activities protected by the First Amendment" is used by the department in evaluating a request for a FISA order?

Answer: In determining whether "activities are protected by the First Amendment," as that phrase is used in 50 U.S.C. §§ 1861(a)(1) & (2)(B), the Department consults the First Amendment jurisprudence of the U.S. Supreme Court as well as other federal courts.

c. What procedures are in place to ensure that such orders are not sought solely on the basis of activities protected by the First Amendment of the U.S. Constitution?

Answer: In preparing an application for any FISA order, including any application under section 215, the Office of Intelligence Policy and Review of the Department of Justice conducts a review to determine that the underlying investigation is not being conducted solely on the basis of those constitutionally protected activities. An application that did not contain such other facts and circumstances would not be presented to the Foreign Intelligence Surveillance Court for approval.

21. DOJ spokesman Mark Corallo has been quoted as saying that the Department is considering holding public hearings around the country to explain and debate the USA PATRIOT Act (*Bangor Daily News*, April 4).

a. Will the Department conduct a series of public hearings around the country on this topic?

Answer: Last year, Mr. Corallo discussed the possibility of a more formal response to the campaign of misinformation by opponents of the Patriot Act. This past summer, the Attorney General visited over 30 cities across the country to discuss the USA PATRIOT Act and the government's efforts in the war on terrorism. The Attorney General spoke to members of the law enforcement community and conducted over 100 media interviews -- television, radio, and print -- in order to educate the public about the Patriot Act. Simultaneously, the United States Attorneys across the country held dozens of town-hall meetings to inform the citizens of their communities about the Act and answer any questions posed by the public.

b. If so, will you make available high ranking DOJ officials to participate in these hearings to listen directly to the public?

Answer: See answer to 21(a) above.

c. Will you provide other opportunities for the public to give input and feedback about changes to our criminal and foreign intelligence investigation laws and guidelines made since September 11, 2001 with the stated purpose of assisting in the war on terrorism?

Answer: It would be appropriate for the Congress to entertain public comments about any changes in the laws. The Justice Department will continue to enforce the laws passed by Congress and defend the American people from terrorist attacks.

22. As you know, a draft of the so-called PATRIOT Act II has been circulating in the media and on the web for several months. I accept your testimony that you are not planning to introduce it now or in the future in its current form. However, as you know, the USA PATRIOT Act was rushed through Congress with little time for the kind of extensive debate typically given to such a proposal. We can debate the need for moving it so quickly at that time, but I think we can agree that it was a very significant expansion of prosecutorial and investigative authority.

a. Will you promise to engage in a full and complete debate over any additional powers or authorities that you request in the future?

b. Can we have your personal assurance that you and the Department will not try to pressure the Congress, directly or through the media, to act on requests for expanded authority prior to a full and complete debate?

Answer: The Department of Justice is fully committed to consulting with Congress on all legislative initiatives, including those designed to protect the American people from terrorist attacks while preserving their civil rights and liberties. All branches of the federal government have a vital part to play in the war on terrorism, and Congress's role in the development and adoption of anti-terrorism legislation is a significant one indeed.

In many ways, the extensive consultations and deliberations that characterized the adoption of the USA PATRIOT Act are the model of effective interbranch cooperation. In the six weeks between the terrorist attacks of September 11 and October 26, 2001, when the President signed the USA PATRIOT Act into law, high-ranking Executive Branch officials met with Members of Congress and their staffs on countless occasions to discuss the legislative response to the attacks of September 11th. These intensive discussions resulted in the USA PATRIOT Act being passed in the Senate by a near-unanimous margin of 98-1, and 357-66 in the House of Representatives, with the support of members from across the political spectrum. We anticipate that, should any anti-terrorism legislative proposals be introduced in the future, those measures would inspire similarly extensive consultations and deliberations.

23. The USA PATRIOT Act made numerous changes that enhanced the power of the federal government to investigate and prosecute terrorism threats and crimes. Some of these powers apply only to terrorism investigations, while others are tools that apply to all federal investigations. Now that you have had time to use many of these tools, it would be very helpful to our oversight efforts to know which ones the Department finds most valuable and useful and which ones are less important, not used frequently, or unnecessary.

a. Can you tell us which authorities have proved most useful and why?

Answer: Although prior to the signing of the USA PATRIOT Act, there were criminal statutes that addressed the investigation and prosecution of terrorism threats and crimes, they were not sufficient to combat the complexity nor the severity of modern terrorism. Limitations on jurisdiction and a lack of legal tools to deal with emerging terrorist techniques prevented the U.S. government from sufficiently tackling the serious threat of terrorism in the modern world. The USA PATRIOT Act addressed this problem by both applying current statutes (e.g., the RICO statutes) to terrorism and also developing new statutes, e.g. sections 201, 801, 810, specific to modern terrorism. These innovations have been critical in the fight against terrorism. Federal prosecutors and United States Attorneys have already

employed many of these new tools in several cases as well as ongoing investigations. The following provides a more detailed explanation of specific sections of the USA PATRIOT Act and their application. This list is by no means complete as there are numerous sections which have been used or are currently being used in ongoing investigations. Rather, we have tried to provide a broad sampling of the ways in which the PATRIOT Act has been used to illustrate its utility and necessity.

The USA PATRIOT Act has enabled the U.S. government to more effectively process and analyze law enforcement and intelligence information. Prior to the Act, intelligence and law enforcement agencies and personnel were discouraged from sharing certain types of information. This restriction represented a serious impediment to effective antiterrorism efforts and risked unproductive approaches to the apprehension and prosecution of terrorists and criminals. Provisions of the Act, such as sections 203, 218, 403, 504, and 905, have enabled the intelligence arm and the law enforcement arm of the U.S. government to coordinate their efforts by breaking down the "wall"[1]. As FBI Director Robert Mueller explained, "[t]he Patriot Act has allowed us to ensure that the aggregate intelligence gleaned from those cases is analyzed for trends and for connections that might not be visible to us from a review of individual cases. This threat-based look at FBI intelligence has allowed us to uncover terrorist networks and connections within the United States that otherwise might not have been found."[2]

Such exchanges of information have occurred between the law enforcement and intelligence communities on numerous occasions. Sections 218 and 504 were essential to the success of the Sami Al-Arian investigation in Tampa, Florida. Al-Arian was indicted on conspiracy charges related to his involvement with the North American cell of the Palestinian Islamic Jihad (PIJ) cell. Sections 218 and 504 enabled prosecutors to consider all evidence against the defendant, Sami Al-Arian, including evidence obtained pursuant to FISA. By considering the intelligence and law enforcement information together, prosecutors were able to create a complete history for the case and put each piece of evidence in its proper context. This comprehensive approach enabled prosecutors to build their case

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[1]Section 203 allows for the sharing of information between the intelligence and law enforcement communities.
Section 218 amends the predicate for the use of the Federal Intelligence Surveillance Act (FISA) to a "significant" purpose of foreign intelligence.
Section 403 requires the FBI to share criminal-record information with the INS and the State Department for the purpose of adjudicating visa applications.
Section 504 allows for coordination between the intelligence community and the law enforcement community in FISA searches and surveillance.
Section 905 requires the Attorney General to disclose to the CIA Director any foreign intelligence acquired by a DOJ element during a criminal investigation; the Attorney General can provide exceptions for classes of information to protect ongoing investigations.

[2]Robert S. Mueller, "Combatting [sic] Terrorism" (congressional statement presented before the United States Senate Committee on the Judiciary, July 23, 2003).

and pursue the proper charges. Thus, sections 218 and 504 were essential in allowing prosecutors to fully consider all evidence in this particular case and then move forward in an appropriate manner.

Information exchange under sections 203 and 905 has occurred via FBI JTTFs. The number of Joint Terrorism Task Forces has nearly doubled since September 11th, and the staff has greatly increased. These task forces have been integral to the dissemination of information between agencies, which has resulted in actual convictions. The information-sharing proscribed by section 403 has also yielded significant results. The FBI has already turned over more than 8.4 million records from NCIC databases to the State Department and disclosed 83,000 comprehensive records of key wanted persons from the NCIC databases to the INS.

In addition, the USA PATRIOT Act has improved law enforcement officers' ability to obtain critical evidence necessary to thwart terrorist plans and apprehend the terrorists themselves. The Department of Justice has found sections 207, 213, and 219 particularly useful in this regard[3]. Section 207 has afforded law enforcement officials the additional time needed to conduct intricate and complex terrorist investigations. It has also alleviated the burden of constantly reapplying for and adjudicating search warrant requests, time which could better be spent on the investigation and prosecution of the offenders.

Section 213 has been essential in increasing the safety of government officials and witnesses as well as the effectiveness of terrorist investigations. Advanced notification to terrorist suspects of searches or surveillances could result in destroyed evidence, notification of co-conspirators, attacks on agents and potential witnesses, or even the immediate execution of a terrorist plot. Between October 26, 2001, and the Spring of 2003, 47 delayed notice warrants had been issued. Those instances include cases which have since been charged, e.g. *United States v. Odeh*, a narco-terrorism case, and *United States v. Dhafir*, a money laundering case, and others still pending. Section 213 has enabled investigators to obtain decisive evidence for the prosecution of serious offenders.

Section 219 expedited the process for obtaining warrants in complex multi-district cases. This section has saved investigators valuable time by enabling the judge most familiar with a case to approve a request for a search warrant for premises outside his/her district. In connection with the anthrax found at America Media, Inc. in Boca Raton, Florida, federal investigators were permitted by section 219 to obtain a search warrant for those premises from the federal judge in Washington, D.C., presiding over the larger investigation who was knowledgeable regarding the entire investigation.

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[3] Section 207 increases the number of days for a search or surveillance order.
Section 213 provides for delayed notification warrants, especially in situations regarding public and officer safety.
Section 219 allows courts to approve nationwide search warrants in terrorist investigations.

The USA PATRIOT Act refinements pertaining to communications have also significantly enhanced the tools available to investigators and prosecutors. The sections related to voice mail, the Internet, and computers were critical to the investigation of the Daniel Pearl case, which made use of sections 209, 212, 216, and 220 of the USA PATRIOT Act[4]. Not only were investigators able to compile important evidence in the case using these means but they were also able to identify some of the perpetrators.

These communication provisions have also been used in other federal cases. For example, under section 212, federal agents were able to obtain the identity of a person posting online bomb death threats directed at high school faculty and students. Similarly, section 216 aided a variety of federal investigations, including investigations of terrorist conspirators, a drug distributor, and a four-time murderer. Section 220 was used to follow a dangerous fugitive and a computer hacker who stole a company's trade secrets and then extorted money from the company.

Other sections which address new forms of technology and communication have also been utilized. Section 210 was used to combat computer hackers targeting over fifty government and military computers[5]. Section 217, which placed cyber-intruders on the same footing as physical intruders, has enabled hacking victims to seek law-enforcement assistance to combat hackers, just as burglary victims can invite police officers into their homes to catch burglars[6]. Since the passage of the USA PATRIOT Act, this provision has been used on several occasions.

Three sections of the USA PATRIOT Act have been particularly useful in money laundering investigations and prosecutions. They are Sections 319(a), 371 and 373.

Section 319(a), added a new subsection, 18 U.S.C. § 981(k), which provided the authority to forfeit funds in the U.S. correspondent account of a foreign bank where funds subject to forfeiture are deposited in a foreign bank account. While this authority has been used only where there is no other

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[4]Section 209 allows voice mail stored with a third party provider to be obtained with a search warrant, rather than a wiretap order.
Section 212 allows computer-service providers to disclose communications and records of communications to protect life and limb; and clarifies that victims of computer hacking can disclose non-content records to protect their rights and property.
Section 216 amends the pen register/trap and trace statute to apply to internet communications, and to allow for a single order valid across the country.
Section 220 permits courts to issue search warrants for communications stored by providers anywhere in the country; court must have jurisdiction over the offense.

[5]Section 210 clarifies the types of records that law enforcement can subpoena from communications providers, including the means and source of payment.

[6]Section 217 enables victims of computer attackers to seek law enforcement officers' help in monitoring trespassers on their systems.

feasible alternative, such as where there is no treaty with the foreign country or where the foreign country is not cooperative, 18 U.S.C. § 981(k) has provided the basis for the seizure and forfeiture of funds in five cases involving a total of approximately $7 million.

To date, these cases have involved fraud schemes or illegal money transmitting violations under 18 U.S.C. § 1960, which was amended by Section 373 of the USA PATRIOT Act (see below). The Department first used Section 319(a) less than a month after Congress enacted the USA PATRIOT Act to seize $1.8 million in fraud proceeds deposited in a bank account in Belize. Because the Belizean bank maintained a correspondent account at a New York bank, the funds in the correspondent account were subject to seizure under Section 319(a). More recently, funds were seized from U.S. correspondent accounts following the deposit of criminal proceeds or funds transmitted in violation of 18 U.S.C. § 1960 in banks in Yemen, Oman, India, Taiwan, Israel, and Jordan.

Section 371, codified at 31 U.S.C. § 5332, prohibits smuggling currency or monetary instruments in an amount exceeding $10,000 across U.S. borders. Since its enactment, this authority has been used repeatedly to prosecute currency smugglers and to forfeit currency involved in the smuggling offense.

In Section 373, Congress amended 18 U.S.C. § 1960 to prohibit money transmitting businesses from operating without a state license or without being federally registered, and to prohibit the transmission of criminal proceeds or any funds transferred in support of criminal activity. The amended version of 18 U.S.C. § 1960 has been an extremely useful tool in the prosecution of money transmitting businesses who operate without licenses or who transmit funds in violation of its provisions. Among the successful prosecutions to date are *United States v. Mohamed Albanna* (W.D. N.Y.) and *United States v. Mulamin Turay* (W.D.KY). Most recently, in the Lakhani case in New Jersey, the Department of Justice charged two of the co-defendants with conspiracy to violate 18 U.S.C. 1960 when they allegedly accepted a $30,000 "downpayment" for shoulder-fired missiles in cash and remitted it through an unlicensed money transmitter to the supposed supplier.

Other highly useful provisions of the USA PATRIOT Act in money laundering prosecutions include Sections 322, 363, 365, 372 and 377.

Section 322 filled a loophole in the "fugitive disentitlement doctrine" enacted as part of the Civil Asset Forfeiture Reform Act of 2000 (Pub. L. No. 106-185). Through this provision, codified at 28 U.S.C. § 2466, fugitives in criminal cases are prevented from contesting the forfeiture of property in a related forfeiture case unless he or she returns to face the criminal charges. Section 322 made clear that a fugitive may not use a corporation to contest a forfeiture where the fugitive is a majority shareholder or is using the corporation to do indirectly what he or she could not directly.

Section 365 of the USA PATRIOT Act created a new provision requiring nonfinancial trade or businesses to report to the Financial Crimes Enforcement Center one or more related currency transactions exceeding $10,000. While this provision has been useful to prosecutors, a typographical

error referring to a non-existent section has created unnecessary confusion regarding the ability to forfeit the proceeds of this criminal activity.

Also useful have been the new specified unlawful activities and RICO predicates added by Sections 315, 375 and 813, which amended 18 U.S.C. §§ 1956(c)(7) and 1961(1) to include corruption by foreign public officials, terrorist crimes, and other unlawful acts that generate proceeds. While the ex post facto clause of the U.S. Constitution has limited the full use of the new specified unlawful activities in criminal cases, some of the new provisions have been used in connection with civil forfeiture proceedings under 18 U.S.C. § 981.

In connection with forfeiture proceedings, the amendment to 21 U.S.C. § 853(e)(4) in Section 319 of the USA PATRIOT Act has provided important authority to order defendants in criminal cases to repatriate assets held outside U.S. borders. This provision is now embodied in the form of restraining orders that the Department of Justice provides for prosecutors to use in any criminal case in which it appears that the defendant may have placed forfeitable assets abroad.

In addition, Section 1004 of the USA PATRIOT Act, codified at 18 U.S.C. § 1956(i), clarified that venue was proper for a money laundering charge in the district where the underlying specified unlawful activity occurred, if the defendant participated in the transfer of the proceeds from that district to the district where the money laundering transaction occurred. Additionally, the new authority resolved a split in the Circuits by defining a transfer of funds as a single, continuing transaction. The new venue authority has facilitated money laundering prosecutions in virtually every district.

The USA PATRIOT Act also criminalized certain activities not specifically and clearly covered before. For example, section 803 made it a crime to harbor terrorists. Similarly, new sections on "material support" have enabled prosecutors to truly address the global nature of terrorism. Section 805 of the USA PATRIOT Act bolstered the ban on providing material support to terrorists by clearly making it a crime to provide terrorists with "expert advice or assistance," and by clarifying that "material support" includes all forms of money, not just hard currency. In addition, section 810 increased the penalty for providing material support to a terrorist organization from 10 to 15 years' imprisonment. For example, members of a terrorist cell in Buffalo were charged with and pled guilty to providing material support relying on these provisions.

Some of the sections of the USA PATRIOT Act have focused primarily on increasing government personnel and resources. Both the need for and benefit of this increased capacity are already evident. Prior to the passage of the USA PATRIOT Act, the United States was vulnerable to those who would use our programs for education and cultural exchange to enter the U.S. for other purposes. The U.S. government has always cherished the cultural exchanges it has hosted within its own borders. However, the government is also ever aware of its responsibility to safeguard our citizens as well as our lawful visitors. Post-9/11 we learned that one of our most serious threats can come from within the U.S. if we allow members of terrorist cells to enter and lay dormant, waiting for an opportunity to

strike. With this in mind, the USA PATRIOT Act has increased immigration personnel and tools to ensure that those entering the U.S. are doing so with the intention of learning and contributing to the U.S., rather than seeking its destruction.

The northern border of the United States has long been seen as a potential entry point for terrorists as it was understaffed and insufficiently monitored. Section 402 tripled the number of Border Patrol personnel, Customs Service personnel, and Immigration and Naturalization Service inspectors. It also allocated an additional $50 million each to the Customs Service and the INS. An inability to efficiently track foreign visitors also posed a threat to national security. Section 414 required the U.S. government to quickly implement the exit and entry data system requested by the Congress in 1996. The INS has already completed the National Security Entry Exit Registration System (NSEERS). NSEERS, while not part of the PATRIOT Act, is able to both monitor entry into the United States as well as track expired visas or persons who have failed to fulfill the stated purpose of their reason for entry. As of June 3, 2003, INS NSEERS had led to the identification and apprehension of 11 suspected terrorists and denial of admission to more than 765 aliens at our ports of entry who presented law enforcement threats due to outstanding felony warrants or prior criminal or immigration violations rendering them inadmissable.

The USA PATRIOT Act seeks to protect America from terrorist acts while preserving our civil liberties. We have vigilantly employed the sections of the PATRIOT Act which call for training of government officials and have found them most useful in ensuring that the employees of the United States government are not only able to do the job they are required to do, but also that they are supported in attaining those goals. Section 908 requires the Attorney General to establish a program to train government officials in the identification and use of foreign intelligence. Since December of 2002, the Department of Justice (OIPR, the Criminal Division, and the FBI) have worked alongside the CIA to create a FISA training program for Department lawyers and FBI agents involved with intelligence. The first of these four day National Security Conferences was held on May 6, 2003, and several others have been held since that time. Hundreds of prosecutors and agents have received this training to date. The Department of Justice is committed to the war on terrorism and appreciates the tools that Congress has provided through the USA PATRIOT Act.

b. Can you also tell us which have not proven particularly useful and why?

Answer: One provision of the USA PATRIOT Act that has not been particularly useful is Section 319(b), codified at 31 U.S.C. § 5318(k). This provision provides the authority to obtain foreign bank records from those foreign banks that maintain a correspondent bank in the United States.

While this authority has been authorized for use on one occasion to obtain foreign bank records, its usefulness is limited for a number of reasons. First, it is limited to administrative subpoenas. Unlike grand jury subpoenas, administrative subpoenas are not subject to the disclosure limitations of federal law. Therefore, the correspondent banks receiving administrative subpoenas may, and in some cases

might be required, to disclose the receipt of the subpoena to the account holder. This is counterproductive to covert investigations because the use of an administrative subpoena will tip off the account holder, who is often the target of the investigation.

Second, the text of 31 U.S.C. § 5318(k) has been construed conservatively by the Justice Department to limit the use of these subpoenas to instances where there is a nexus between the funds deposited in a foreign bank and the correspondent account in the United States. Prosecutors are therefore faced with a high evidentiary threshold to obtain approval for these subpoenas as they often need the foreign records they seek in order to demonstrate the nexus with the correspondent account.

Finally, the use of a subpoena to obtain foreign bank records under this provision, like a Bank of Nova Scotia grand jury subpoena, is not approved where there is an alternative mechanism to obtain the records, such as a mutual legal assistance treaty. In sum, this provision has the potential to be extremely useful in international financial crime and terrorism investigations.

c. Can you tell us which authorities have not been used?

Answer: The Department has not yet had an appropriate opportunity to use certain provisions of the USA PATRIOT Act, including (but not limited to) Section 806. Also, please refer to our answer to question 18, in which we note that, as of September 18, 2003, the FBI had not utilized Section 215 of the USA PATRIOT Act (relating to the production of business records).

While we have not yet had an appropriate opportunity to use Section 806, we expect that it will be highly useful in forfeiting the assets of terrorists, terrorist organizations and those who influence or support terrorism. By providing for the civil and criminal forfeiture of all assets, foreign and domestic, of any individual or organization engaged in terrorism and any assets used to commit or facilitate terrorist acts, Section 806 of the USA PATRIOT Act, codified at 18 U.S.C. § 981(a)(1)(G), is a tremendous tool for prosecutors. However, it has not been necessary for the Justice Department to seek forfeiture under this authority because the terrorist assets were frozen by OFAC. Forfeiture, unlike freezing, enables a court to transfer title to the United States. To date, none of the frozen assets have been forfeited to the United States, and it has not been appropriate to employ this powerful provision.

d. Are there any authorities changed in the USA PATRIOT Act that you recommend Congress reverse or further limit?

Answer: While there are no sections of the USA PATRIOT Act that the Department of Justice would recommend limiting or reversing at this time, we are reviewing certain sections for possible clarification. We look forward to continuing to work with the Congress on legislation which will assist our efforts in the war on terrorism

24. As Attorney General you are charged with protecting and defending the rights guaranteed to American citizens in the Constitution. That includes their safety and security, but it also includes their liberty and freedom.

a. What recommendations would you make to modify the changes made in the USA PATRIOT Act to better protect the liberty and freedom of U.S. persons without significantly compromising our need to protect safety and security?

b. Are their additional protections, beyond modification to the USA PATRIOT Act, that you can recommend to Congress to better protect our liberty and freedom?

Answer: Since the September 11th terrorist attacks, the Department of Justice has been unambiguous that its mission in the war on terrorism is a twofold one: preserving innocent lives while safeguarding the rights and liberties that are the birthright of every American. On September 17, 2001, less than a week after our nation came under attack, the Attorney General emphasized that "in our effort to make sure that law enforcement can gain the intelligence that it needs in order to protect America, we are also mindful of our responsibility to protect the rights and privacy of Americans." And in testimony before the House Judiciary Committee on September 24, 2001, the Attorney General stressed: "The fight against terrorism is now the highest priority of the Department of Justice. As we do in each and every law enforcement mission we undertake, we are conducting this effort with a total commitment to protect the rights and privacy of all Americans and the constitutional protections we hold dear."

For this reason, every anti-terrorism initiative launched in the past 29 months has been undertaken with a steadfast commitment to America's tradition of civil rights and liberties. For example, the revised Attorney General's investigative guidelines expressly instruct FBI agents to comply with all relevant laws, including the Constitution, when conducting investigations. And the guidelines flatly prohibit agents who visit public places and events from "maintaining files on individuals solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of any other rights secured by the Constitution or laws of the United States." Various provisions in the USA PATRIOT Act likewise provide that investigations of United States persons cannot be "conducted solely upon the basis of activities protected by the first amendment to the Constitution." In addition, the President's order establishing military commissions explicitly instructs that detainees must be "allowed the free exercise of religion," and specifically contemplates that any individuals tried before a commission will be represented by counsel.

25. The response from the Department of Justice to the Committee's questions concerning its use of the USA PATRIOT Act states that DOJ has used "sneak and peek" warrants on 47 separate occasions, and have sought to extend the period of delay for notice 248 times.

Have these warrants been used in ordinary criminal cases, such as drug prosecutions unrelated to terrorism? If so, how many times?

Answer: Section 213 of the USA PATRIOT Act allows courts to give delayed notice that a search warrant has been executed. This authority can be used only in certain narrow circumstances where immediate notification could result in serious harms, such as death, physical injury, flight from prosecution, or witness intimidation. In all cases, law enforcement is legally obligated to give notice that property has been searched or seized. In fact, it would be a violation of the USA PATRIOT Act to fail to provide notice after the court-approved period of delay has expired.

For years before the USA PATRIOT Act, courts had the legal authority to delay notice in a wide variety of ordinary criminal cases, including drug prosecutions. *See, e.g., United States v. Villegas*, 899 F.2d 1324, 1337 (2d Cir. 1990). But because of differences between jurisdictions, the pre-PATRIOT law was a mix of inconsistent standards that varied widely across the country. This lack of uniformity hindered complex terrorism cases. Section 213 thus did not *create* the authority for delayed notice on search warrants; that authority has been recognized by the courts in many cases for some time. Rather, section 213 resolved a problem by establishing a uniform statutory standard for the practice of delayed notice. And, of course, because the provision was codifying and making uniform an authority that had existed for use in any criminal case, section 213 did not impose a new restriction on that authority by needlessly limiting it to terrorism cases.

26. Some libraries have made a practice of destroying computer records and other records in defiance of the PATRIOT Act, saying that they don't agree with it. These institutions are attempting to make it more difficult for the Justice Department to come in and actually search those records.

a. Has any investigation been stymied as a result of this?

b. Has the Justice Department sought information that it learned has been destroyed by any of the libraries?

Answer: We are not aware of any information in our possession that would permit us to respond to either of these questions.

27. I have learned that university officials in Arizona have approached the FBI in an attempt to assist with ongoing investigations on students suspected of terrorism. The university administration asked if it might be able to provide needed information to the FBI. The FBI refused these offers.

What is the policy of the Justice Department in terms of cooperating with local officials outside of the law enforcement community who may have information that would be helpful to terrorism investigations?

Answer: The Phoenix Division of the FBI has an effective working relationship with the police departments of both major universities within its jurisdiction. The SAC and ASAC have met with executive level representatives from Arizona State University to discuss enhancing communications. ASU's police have identified an officer to become a full-time member of the Phoenix Joint Terrorism Task Force and a security clearance has been issued to the University's Chief of Police.

The Phoenix Division has identified only one event that may be the subject of this inquiry. In April 2003, the Phoenix Division Joint Terrorism Task Force executed an ATF search warrant on three ASU students. The warrant executions generated some press coverage and the field office was contacted by someone calling on behalf of the main Muslim student group at ASU. The group requested a meeting with FBI officials on the ASU campus, with the media in attendance. FBI officials declined this invitation, but did agree to meet with several members of the student group to discuss information regarding the case which would become publicly available. Before the meeting could take place, the warrants were sealed by the United States Attorney's Office thus negating any discussion of the case. FBI officials offered to meet with the students to discuss general terrorism topics. The field office was not recontacted and the situation was not discussed at the recent meeting between FBI and University officials.

28. In his report on 9/11 detainees, the IG explains that after September 11, the Justice Department was concerned about the possibility of additional sleeper cell attacks and that the FBI immediately sought to shut down any "sleeper" cells of terrorists who might be preparing another wave of violence.

a. Is this an accurate description of the Justice Department and FBI's focus following the September 11 attacks?

Answer: In the days, weeks and months after the terrorist attacks of September 11th, the FBI by necessity worked under the assumption, based on consistent intelligence reporting, that a second wave of attacks could be coming. We did not know where, when, or by whom, but we knew that the lives of countless Americans could depend on our ability to prevent that second wave of terror.

b. Isn't it the Department of Justice's duty to use all legal tools, including the Immigration and Nationality Act, to protect the American people from those who would come to our country with malevolent intentions?

Answer: The Department believes that it is best advised to use all legal tools at our disposal to detain, investigate and prosecute violations of our nation's laws and ensure that any threats to the American people are effectively handled. We believe this strategy should include legal tools such as the detention or removal powers authorized under the Immigration and Nationality Act. In addition, given the 87 percent absconding rate of non-detained illegal aliens, noted by the Inspector General in his February 2003 report, it would have been irresponsible to release aliens who were of interest to an ongoing terrorism investigation. With regard to the response in the event of a future terrorist attack, the Department of Justice is working with the Department of Homeland Security on a memorandum of understanding that would govern immigration cases of national security interest to the FBI and the Department of Justice.

29. The IG's report on 9/11 detainees quotes you as stating that even though some of the 9/11 detainees may have wanted to be released or may have been willing to leave the country, it was in the national interest to find out more about them before permitting them to leave.

a. What risk would it pose to the United States if our government were to allow a potential terrorist to leave our country without investigating the alien's possible ties to terrorism?

Answer: If, during the investigation into the attacks of September 11th, the government had released or granted bond to an illegal alien without fully investigating that individual's ties to terrorism, we might have risked another terrorist attack or the loss of an individual who possessed information relevant to the September 11th attacks. Instead, we proceeded with proper diligence and caution, conducting appropriate investigations before releasing or deporting these illegal aliens.

b. What risks would it pose to our relations with another country if we were to return a possible terrorist to that country without investigating the alien's terrorist ties and informing the home country of our government's findings?

Answer: The removal of aliens often raises foreign policy issues and these issues take on even greater significance when the U.S. government possesses information indicating that an individual alien has ties to terrorism. Information-sharing across governments is vital to the ongoing cooperative efforts of each country in light of the international coalition fighting the war on terrorism. In addition, each country needs to be aware of threats that could be posed by its own nationals. Therefore, a thorough investigation was determined to be appropriate for the September 11th detainees.

30. a. Do illegal aliens in the United States have an automatic right to release on bond during removal proceedings, or is release on bond a discretionary

determination made in all cases by an appropriate officer after assessing whether the alien poses a risk to the national security?

Answer: Release on bond during removal proceedings is generally discretionary, Congress has mandated aliens previously convicted of certain offenses and those charged with removal under the security-related provisions must be detained until the removal proceedings are completed. Moreover, the standard for release is not whether an alien poses a risk to the national security: other considerations are to be taken into account. Finally, while DHS makes the initial decision whether to detain an alien during the pendency of removal proceedings, such aliens have a right to seek a redetermination of the DHS custody decision by an immigration judge, unless the alien is subject to mandatory detention. We will continue to work with DHS to provide information and other assistance for DHS's use in that process. As stated above, the Department of Justice is working with the Department of Homeland Security on a memorandum of understanding that would govern immigration cases of national security interest to the FBI and the Department of Justice.

b. Wouldn't it have been irresponsible for the INS or Justice Department to release an alien who the FBI has reason to believe is connected to the September 11 attacks specifically or to terrorism generally?

Answer: Yes, the Department of Justice believes that it would have been reckless to release individuals encountered during the PENTBOM investigation without thoroughly investigating whether they had any connection to or information about the terrorist attacks of September 11th and whether that individual continued to pose a threat to the American people.

31. According to the Inspector General's report on September 11 detainees, there were 762 special interest detainees, of which 515 were deported after being "cleared" by the FBI. What does the word "cleared" mean? Is it true that an alien can be "cleared" for removal but still have connections to terrorism?

Answer: In some cases, the FBI and other law enforcement agencies were able to determine that aliens detained in connection with the September 11th investigation were no longer of investigatory interest, and those individuals were subsequently released or deported. In other cases, while there may have been information linking an individual to criminal or terrorist activity, the information was not substantial enough to prosecute and all indications were that no further substantive information would surface. In those cases, in the interest of national security, it was determined that the best course of action was to proceed with deportation, and remove a potentially dangerous person from our borders based upon an immigration violation rather than release the individual back into American society.

32. When Congress voted on the USA PATRIOT Act, it did so at the strong insistence of the DOJ that these new authorities were necessary in order to fight terrorism. It was further urged that the bill be enacted quickly so that we could get that fight underway. However, it is now clear that many of those new authorities are unnecessary in that regard. Now that we have had more time to look at the effectiveness of these authorities, we can see that some of them were improperly enacted. We can carefully review each new authority and determine which ones, if any, will actually be useful in fighting a war on terrorism. What steps are you planning to take to get this process going and to ensure that it is completed properly and in a timely manner?

Answer: The Justice Department's considered judgment is that the federal government's success in preventing another catastrophic attack on American soil in the 29 months since the September 11th atrocities would have been much more difficult – and perhaps impossible – without the USA PATRIOT Act. Our overall experience is that the new tools authorized by Congress in that Act have greatly strengthened our ability to prevent, investigate, and prosecute acts of terrorism.

Since the USA PATRIOT Act became law in October 2001, the Justice Department and the FBI have used many of its new authorities to investigate the September 11th terrorist attacks. Those tools also have proven equally valuable in our continuing efforts to detect and prevent terrorist acts before they occur, and to arrest and prosecute terrorists. Among other provisions, the Department and FBI have used the tools provided by the following sections of the Act: 201, 203, 205, 207, 209, 210, 211, 212, 216, 217, 218, 219, 220, 319, 373, 402, 403, 414, 416, 801, 805, and 905. Details about the use of these provisions were provided to the House Judiciary Committee in a letter from Acting Assistant Attorney General Jamie E. Brown dated May 13, 2003.

33. The OIG report contains horrifying examples of mistreatment of detainees, including the taunting of detainees by calling them "Bin Laden junior" and telling them "you're going to die here," "someone thinks you have something to do with [9/11] so don't expect to be treated well." The detainees were physically abused as well- an inmate with a broken arm and injured finger had his wrist and finger twisted by officers, another was thrown in his cell naked without a blanket. They were deprived medical attention for injuries sustained in those assaults because, in the words of one physician's assistant, they "were not entitled to the same medical or dental care as convicted federal inmates." Your spokesperson said the Department makes "no apologies" for this conduct. Do you stand by her statement?

Answer: As the Attorney General indicated before the House Judiciary Committee on June 5, 2003, the Department of Justice does not condone the abuse or mistreatment of any person being held in federal custody. The Department takes such allegations seriously and if any such allegations are found to be true, appropriate action will be taken. The statement of the Department's spokesperson applied

to the overall detention policy: that we make no apologies that we detained illegal aliens when statistics show that 87 percent of them abscond when not detained. Again, it is not the policy of the Department to allow the mistreatment of anyone, particularly those persons in federal custody.

34. Section 236A of the Immigration and Nationality Act makes an individual subject to mandatory detention as a person whom the Attorney General has reasonable grounds to believe is linked to terrorist activity, among other endangering activity. Custody under 236A requires "certification." Page 28 of the OIG report states that "as of March 26, 2003, no alien had been certified by the Attorney General under these provisions." Why were none of the 762 individuals certified under these provisions for custody?

Answer: As you may be aware, section 236A of the Immigration and Nationality Act was added as a new provision to the immigration law by Section 412 of the USA PATRIOT Act. Although the Department contemplated using section 236A in a number of cases who presented national security risks following the President's signature of the USA PATRIOT Act into law on October 26, 2001, it was determined that it was unnecessary to use the new certification procedure because traditional administrative bond proceedings proved to be sufficient to detain individuals without bond.

35. What do you propose as a system for the Bureau of Prisons to report to the Department its policies and practices with respect to its treatment of immigration detainees?

Answer: We do not believe a new "system" is necessary for the Bureau of Prisons (BOP) to report to the Department on their policies and practices regarding the treatment of detainees: there is already good communication and coordination between the BOP and the Department on policy and practices in the area of Federal detention.

Federal detention affects several components within the Department, including the Bureau of Prisons, the United States Marshals Service, and the Detention Trustee's Office. There is a great deal of coordination between these components. The intra-departmental coordination included the Immigration and Naturalization Service until that component transferred to the Department of Homeland Security. We continue to coordinate detention issues with the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security. Detention policies are one of many matters discussed and coordinated at meetings of representatives of these various agencies.

36. It is now some 20 months since the government arrested and detained over 1000 immigrants in the wake of 9/11. Nevertheless, the names of those detained are still

being withheld. The main justification for this massive refusal to release information is that doing so will provide a "road map" to al Qaeda and other terrorist groups as to the investigations. However, in the program to interview Muslims, in the special registration program, in the absconders program, in the asylum program, it is clear that the focus was on Muslim men from certain countries. In light of that, why is it necessary to withhold the names of the detainees? It is said that there are national security reasons to withhold some of the names, but it should be possible to release the rest of the names.

Answer: On June 17, 2003, in Center for National Security Studies, et al. v. Department of Justice, the D.C. Circuit reaffirmed the Department's determination not to release the names of September 11th detainees, recognizing the serious nature of the harm that could flow from such disclosure. Partial releases, above and beyond what the Department has determined to release, present potentially serious risks to national security and to the September 11 investigation. As the CNSS court noted, "[w]hile the name of any individual detainee may appear innocuous or trivial, it could be of great use to al Qaeda in plotting future terrorist attacks or intimidating witnesses in the present investigation." On January 12, 2004, the Supreme Court denied a writ of certiorari in this case. In addition, in some cases individual aliens might not wish to have it known that they were thought to be linked, at least initially, to a terrorism investigation.